No. 87-1310-CSX
Status: GRANTED

Title: East Kentucky Energy Corporation, et al.,
Petitioners
v.
County Commission of Webster County, West Virginia

Docketed:
February 5, 1988

Court: Supreme Court of Appeals
of West Virginia

Vide:
87-1303

Counsel for petitioner: Prettyman Jr.,E. Barrett

Counsel for respondent: Brown,Charles G.

Entry	Date	Note	Proceedings and Orders
1	Feb 5 1988	G	Petition for writ of certiorari filed.
2	Mar 9 1988		DISTRIBUTED. March 25, 1988
3	Mar 10 1988	X	Brief of respondent County Commission of Webster County in opposition filed.
4	Mar 18 1988	X	Reply brief of petitioners East KY Energy, et al. filed.
5	Mar 28 1988		Petition GRANTED. The case is consolidated with 87-1303, and a total of one hour is allotted for oral argument.
			**********
7	Apr 21 1988		Order extending time to file brief of petitioner on the merits until May 26, 1988.
8	May 9 1988		Record filed.
		*	Certified copy of original record, 2 boxes received.
9	May 26 1988		Joint appendix filed. VIDED.
10	May 26 1988		Brief of petitioners Allegheny Pittsburgh Coal Co., et al. filed. VIDED.
11	May 26 1988		Brief amicus curiae of National Taxpayers Union filed.
12	May 26 1988		Brief amicus curiae of National Assn. of Realtors filed. VIDED.
13	May 26 1988		Brief amicus curiae of International Assn. of Assessing Officers filed.
15	Jun 3 1988		Order extending time to file brief of respondent on the merits until July 30, 1988.
16	Jul 7 1988		Brief amici curiae of pacific Legal Foundation filed. VIDED.
17	Jul 29 1988		Brief amici curiae of National Association of Counties, et al. filed. VIDED.
18	Jul 29 1988		Brief of respondent County Commission of Webster County filed. VIDED.
19	Aug 10 1988		CIRCULATED.
20	Aug 24 1988	X	Reply brief of petitioners Allegheny Pittsburgh Coal Co.,et al. filed. VIDED.
21	Sep 30 1988		Set for argument. Wednesday, December 7, 1988. This case is consolidated with 87-1303. (2nd case) (1 hr.)
22	Dec 7 1988		ARGUED.

87-1310

No. _____

Supreme Court, U.S.
FILED
FEB 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EAST KENTUCKY ENERGY CORPORATION,
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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QUESTIONS PRESENTED

A county tax assessor systematically arrives at the assessed value of property subject to recent sale by relying exclusively on the sales price, without adjusting the assessment of unsold comparable properties to that value. The result is that property subject to recent sale is assessed and taxed at a level as much as *6,500 percent higher* than properties stipulated and found to be comparable in every pertinent respect.

1. Did the court below err in holding that the discriminatory taxation resulting from this policy—known as the "welcome stranger" approach—did not violate the guarantee of equal protection in the Fourteenth Amendment to the United States Constitution?

2. Did the court below err in denying taxpayers subject to this discriminatory treatment any reduction in the assessment of their property, on the ground that they should instead seek to raise the assessments of all other comparable properties in the county, contrary to the holdings of this Court in *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946), *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), and other cases?

PARTIES TO THE PROCEEDINGS

Petitioners before this Court, appellees before the West Virginia Supreme Court of Appeals, and petitioners before the Webster County Circuit Court are East Kentucky Energy Corporation, Oneida Coal Company, Inc., and Shamrock Coal Company, Inc. East Kentucky Energy Corporation is a wholly-owned subsidiary of Shell Oil Company. Oneida Coal Company, Inc., and Shamrock Coal Company, Inc., are both wholly-owned subsidiaries of Sun Company Inc. Pursuant to Supreme Court Rule 28.1, a list of parents, subsidiaries, and affiliates of petitioners appears at Appendix J.

Allegheny-Pittsburgh Coal Company was also an appellee below and petitioner before the Circuit Court. We have been advised that Allegheny-Pittsburgh intends to seek review in this Court of the judgment below. Respondent County Commission of Webster County is the official entity that confirmed the challenged assessment of petitioners' property.

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No. ———

EAST KENTUCKY ENERGY CORPORATION,
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioners East Kentucky Energy Corporation ("East Kentucky Energy"), Oneida Coal Company, Inc. ("Oneida"), and Shamrock Coal Company, Inc. ("Shamrock") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the West Virginia Supreme Court of Appeals entered in the above-entitled proceeding on July 17, 1987.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at —— W. Va. ——, 360 S.E.2d 560, and is reprinted in the appendix hereto ("App.") at 1a. That opinion considered certain orders and opinions of the Circuit Court of Webster County (Cline, J.), consolidated for purposes of appeal. Those orders and opinions, some of which contain large portions of verbatim language, are unreported and are reprinted at App. 15a, 49a, 79a, 83a, and 86a.

JURISDICTION

Petitioner East Kentucky Energy challenged the assessment of its real property in Webster County, West Virginia, for the years 1984-1986. Petitioner Oneida and its predecessor Shamrock challenged the assessment of its real property in Webster County for the years 1981-1986. In each instance the County Commission, sitting as a Board of Equalization and Review, sustained the assessments, App. 90a, and petitioners appealed to the Circuit Court of Webster County. By order entered November 22, 1985, the Circuit Court overturned the assessments of East Kentucky Energy for 1984-1985. App. 15a. By order entered February 13, 1986, the Circuit Court overturned the assessments of Oneida and its predecessor Shamrock for 1981-1985. App. 49a. By separate orders entered March 21, 1986, the Circuit Court overturned the 1986 assessments of both East Kentucky Energy and Oneida. App. 83a, 86a.

The County Commission appealed all the orders, and the appeals were consolidated. On July 17, 1987, the Supreme Court of Appeals reversed the Circuit Court in a per curiam opinion that indicated Justice Brotherton's dissent. App. 1a. A timely petition for rehearing was filed on August 13, 1987. On September 18, 1987, Justice Brotherton filed a dissenting opinion, which was now joined by Justice Neely, making the final vote to reverse 3-2. App. 11a. The petition for rehearing was denied on November 10, 1987. App. 14a. The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL PROVISION

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4.

STATEMENT OF THE CASE

West Virginia, like 39 other States and thousands of local governments throughout the country, imposes an *ad valorem* tax on the ownership of real property within its jurisdiction. Since the amount of the tax levied is based on the value of the property, it is necessary to ascertain the value of the different parcels of property owned in the State. In West Virginia and many other jurisdictions responsibility for that task rests, in the first instance, with the county assessor.

Once the county assessor establishes the actual value of the particular parcels of property—the "appraised value"—he applies an appropriate percentage—50 percent in West Virginia—to arrive at the "assessed value." [1] The tax is then levied as a percentage of the assessed value of the property. There is no issue in this case concerning discriminatory tax levies or the application of discriminatory assessment percentages. The unconstitutional discrimination found by the Circuit Court and the two dissenters in the West Virginia Supreme Court of Appeals resides in the initial determination of the value of the property. The property owned by petitioners was appraised—and therefore assessed and taxed—at a dramatically higher level than property owned by others that was comparable in every respect.

Petitioner East Kentucky Energy owns 7,374 acres of property in Webster County, West Virginia. Petitioner Oneida owns some 7,783 acres of property in Webster County previously owned by its sister corporation, petitioner Shamrock. East Kentucky Energy purchased its property from Allegheny-Pittsburgh Coal Company in 1982 for some $30 million. Shamrock purchased the Oneida-Shamrock property in 1977 for some $5.9 mil-

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[1] The 50 percent figure was mandated by state law until 1981, when it was raised to 60 percent. Throughout this litigation, however, the assessor has used the 50 percent figure.

lion. The tax assessor for Webster County relied exclusively upon these purchase prices in arriving at the appraised value of petitioners' property for the years at issue, and then took 50 percent of the appraised value to arrive at the assessed value. East Kentucky Energy's property was thus taxed on the basis of an assessed value of some $15 million, and Oneida-Shamrock's on the basis of an assessed value of some $3 million. App. 3a-4a.

While the assessor thus raised the assessments of petitioners' property to reflect current market value, based on the sales prices, he did not similarly raise the assessments of other comparable property in Webster County. So long as the property was not subject to recent sale, it was carried on the tax books with the same assessment it had borne in prior years, with only occasional *de minimis* adjustments. App. 6a, 27a-28a, 58a. As a result of this assessment system, recently-conveyed property was assessed on the basis of its actual current value, while other comparable property—with the *same* actual value—was assessed, and therefore taxed, at a much lower level.[2]

Petitioners sought review of their assessments in the Webster County Circuit Court "on the grounds that the assessments violated the equal and uniform clause of article X, section 1 of the West Virginia Constitution, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." App. 4a. The facts stipulated by the parties, or established by findings of the Circuit Court undisturbed on appeal, highlight the

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[2] This assessment practice has been referred to as the "welcome stranger" approach. *See, e.g.*, Comment, *Hellerstein v. Assessor of the Town of Islip: A Response to Inequities in Real Property Assessments in New York*, 27 Syracuse L. Rev. 1045, 1061 (1976) ("newly-acquired parcels, although they may be equivalent in value to the long-held parcels, are assessed for a higher amount due to appreciation of land values. The 'new' owner—the 'stranger'—will pay higher taxes proportionately than the owner of a long-held parcel who 'welcomes' the fact that he consequently pays lower taxes").

dramatic disparity between the valuation of petitioners' property and that of comparable property owned by other taxpayers in Webster County.

With respect to the property owned by East Kentucky Energy, the Circuit Court concluded that

> the evidence presented clearly and convincingly establishes that the assessor, and the Board of Equalization and Review, in sustaining the questioned assessments, have, over a period of ten years, systematically and intentionally assessed the petitioners' real estate, and consequently levied taxes against petitioners' real estate, at a weighted rate per acre of from 5,672.56 to 6,511.06 percent in excess of the weighted rate per acre assessment applied to comparable real estate owned by others and located adjacent, contiguous or near that of petitioners. [App. 40a.]

The Circuit Court found that the average assessed value for representative property owned by East Kentucky Energy in 1984 was $2,043 per acre. The average assessed value for certain property owned by others in Webster County that was comparable "in topography, location, access, development, mineral content and forestation" was $62.15, based on one list of comparable property, and $58.31, based on another. App. 16a, 21a-25a. Thus, for 1984 alone, the average assessed value of East Kentucky Energy's property was some *33 times* the average assessed value of comparable property owned by others—property that should have had roughly the *same* assessed value.

The Circuit Court found a similar disparity when it considered the assessment of property owned by Oneida-Shamrock. Oneida's property was assessed at $376.95 per acre. Four comparable coal properties that the Circuit Court found to be "generally indicative of the assessment of Webster County coal tracts during the period in question" were assessed at $21.99, $48.55, $19.21, and

$22 per acre. App. 54a, 60a-61a. The Oneida-Shamrock property was thus assessed at from *eight to twenty times* the assessed value of comparable property.

The Circuit Court noted that the assessed value of petitioners' property was also dramatically higher than the values recommended by the State Tax Commissioner. That official has responsibility under West Virginia law for appraising all property in the State, and his appraisal is to serve as a guideline for the county assessors.[3] The Tax Commissioner fixed the value of Webster County coal property at $360 per acre, yielding an assessed value of $180 per acre. App. 46a. The Circuit Court found that the assessor totally ignored these figures in arriving at petitioners' assessments, which were of an entirely different order of magnitude. The court found that after the assessor received the Tax Commissioner's appraisal, "it was placed in a drawer where it remained unused and abandoned until the day of the hearing." App. 34a, 66a.

The Circuit Court specifically found that the disparity between the assessment of petitioners' property and that of comparable property owned by others could *not* be traced to any distinguishing characteristics or unique features of petitioners' property.

> The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon the [comparable] properties.
>
> The questioned assessments were not based upon present use or immediately foreseeable economic development of petitioners' real estate. The assessor did not consider the size, shape, locations, access, or availability of public highways, sewers, water, gas or electricity in assessing either the petitioners' real estate or the real estate listed in the Exhibit B or G comparables. [App. 29a; *see* App. 59a.]

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[3] *See* W. Va. Code 18-9A-11; *see also* App. 34a-35a, 66a-67a.

No distinguishing characteristics could explain the disparity in assessments because "the assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." App. 29a, 59a. On the contrary, "[t]he sole basis for the assessment of petitioners' real estate was, according to the assessor, the consideration declared in petitioners' deeds." App. 29a, 59a.

There was, the Circuit Court found, nothing inherently wrong in using recent sales as the basis for assessing real estate. If the assessor elected to rely upon this measure of value, however, he could not rely upon it only for property actually subject to sale.

> [I]f the assessor elects to use recent sales as the basis for the assessment of real estate, he is obligated by the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal and uniform clause of Section 1, Article X, of the West Virginia Constitution to base the real estate assessments of substantially similar real estate, whether owned by a corporation or an individual, upon the same or a similar value, depending on certain variables, even though the real estate has not been the subject of a recent conveyance. [App. 42a, 74a.]

The court found that "by intentionally and systematically failing to either equalize assessments by increasing the assessed value of substantially similar property to the level of petitioners' assessments, or to equalize assessments by lowering petitioners' assessments to the level at which comparable real estate was being assessed," the assessor and the Board had violated both the State and Federal Constitutions. App. 42a-43a, 74a.

In concluding that the assessor's practice contravened the Equal Protection Clause, the Circuit Court considered and rejected the assessor's suggestion that "over a

period of time equalization would be accomplished through periodic increases in the assessment of property which had not recently changed hands." App. 27a, 58a. Between 1975 and 1984 the average assessment of the properties found to be comparable to East Kentucky Energy's property increased $3.86 per acre annually for one list of comparable properties and $3.37 per acre annually for the other list of comparable properties. App. 27a-28a. The Circuit Court noted that if the same rate of increase were maintained for the comparable properties—even if the assessment of East Kentucky Energy's property remained the same—it would take *over 500 years* for the assessment of the comparable properties to reach that of East Kentucky Energy's property. App. 28a. A similar "incredible period of years would be required for equalization with [Oneida's] present assessment." App. 58a. And if the same rates of increase were applied to petitioners' property in the future, "equalization would, of course, never be accomplished. In fact, the difference between the assessments would become greater, not less." App. 28a, 58a.

The Circuit Court chose the remedy of lowering petitioners' assessments to the levels recommended by the State Tax Commissioner. Where the assessor and Board had assessed East Kentucky Energy's property at $15 million, the Circuit Court held that a nondiscriminatory assessment would be $1.7 million—a difference of $13.3 million. *See* App. 46a. Where the assessor and Board had assessed Oneida's property at $3 million, the Circuit Court held that a nondiscriminatory assessment would be $1.68 million—a difference of $1.32 million. *See* App. 78a. The court acknowledged that it had the authority "to order the assessor to equalize assessments by increasing the assessment of comparable properties to the level at which petitioners' property is assessed." It chose instead, however, to lower petitioners' assessments in order to avoid the severe impact on other owners that would

be caused by raising their assessments to petitioners' level. App. 43a-46a, 75a-78a.

The severity of that impact once again highlighted the discrimination against petitioners. For example, the court noted that assessing certain comparable parcels of property owned by others at the level at which Oneida's property was assessed would necessitate the following increases totalling nearly $14 million for only 7 parcels:

Current assessment of comparable parcels	Assessment if comparables assessed at Oneida's level
$ 35,310.00	$ 605,147.99
65,180.60	1,015,126.30
211,689.38	3,630,405.40
28,622.00	490,411.95
1,197,446.40	5,274,333.40
28,066.03	444,329.81
317,110.00	4,132,461.30

[Source: App. 61a-62a.]

The County Commission appealed the Circuit Court orders to the Supreme Court of Appeals, and the various cases were consolidated for purposes of appeal. On July 17, 1987, the Supreme Court issued a per curiam opinion reversing the Circuit Court and ordering reinstatement of the assessments previously set by the County Commission. The Supreme Court concluded that the consideration recited in petitioners' deeds reflected the true and actual value of petitioners' property, that any undervaluation of other property in Webster County was not "intentional and systematic," and that petitioners' only remedy was to seek to raise the assessments of all other property, rather than to lower that of their own. App. 7a-9a.

The court below reasoned that there was no discrimination against petitioners because the assessment of their

property was based on the true and actual value of that property:

> We find that the record does not support the trial court's ruling that the actions of the assessor and board of review constitute "intentional and systematic" discrimination. The assessments based upon the price paid for the property in arms' length transactions are an appropriate measure of the "true and actual value" of [petitioners'] property. [App. 8a.]

The court concluded that so long as a taxpayer's property is assessed on the basis of market value, the taxpayer cannot have his assessment lowered because of overassessment in relation to other taxpayers. Instead, the taxpayer " 'should seek to have the assessments of other taxpayers raised to market value.' " App. 9a (quoting *Killen* v. *Logan County Comm'n*, 295 S.E.2d 689, 709 (W. Va. 1982)).

Justice Brotherton, joined by Justice Neely, dissented.[4] The dissenters concluded that "the tail is now wagging the dog in West Virginia property taxation." App. 10a. They had no objection to relying on recent purchase prices to ascertain the value of property, but argued that "the quest for true value" could not be limited to certain parcels, and could not

> override the *constitutional* requirement that taxation be equal and uniform. There is neither equality nor uniformity when recent purchasers of property must pay tax based on current value while all other property owners pay tax based on low, outdated assessed values. [App. 10a (emphasis in original).]

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[4] The judgment entered by the court indicated that Chief Justice McGraw and Justices Neely, Miller, and McHugh concurred in the disposition, and that "Justice Brotherton dissents and would affirm the trial judge." App. 13a. A timely petition for rehearing was filed on August 13, 1987. On September 18, 1987, Justice Brotherton filed a dissenting opinion. Despite the indication on the previous judgment, Justice Brotherton was now joined in dissent by Justice Neely. App. 11a.

The dissent "recognize[d] the need for improving the educational system in West Virginia," [5] but argued that "this improvement cannot constitutionally be achieved at the expense of a few taxpayers." App. 10a.

There is no question that the judgment of the West Virginia Supreme Court of Appeals necessarily decided the Federal questions presented by petitioners. The Circuit Court concluded that the discriminatory assessments of petitioners' property violated both the West Virginia Constitution and the Equal Protection Clause of the United States Constitution. App. 43a, 74a ("the assessor and Board of Equalization and Review violated the equal and uniform clause of Section 1, Article X of the West Virginia Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution"). The West Virginia Supreme Court's reversal of the Circuit Court necessarily entailed a reversal of that court's holding based on the Fourteenth Amendment. Indeed, the Supreme Court opinion itself recognized that petitioners "argue that the primary issue presented by this case is whether the assessments of their property and comparable properties are equal and uniform under the United States and West Virginia Constitutions." App. 5a.

REASONS FOR GRANTING THE WRIT

This Court has adopted a properly deferential standard in reviewing claims of discriminatory taxation, but no amount of deference or accommodation for questions of judgment can overlook the nature of the discrimination in this case or its startling magnitude. As the Circuit Court concluded with respect to East Kentucky Energy, respondent levied taxes against that company's

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[5] The property taxes are used primarily for funding the public schools. *See* Farber, *Limitations on Property Taxation in West Virginia: A Method Through the Madness*, 4 W.Va. Pub. Interest L. Rep. 1, 10 (1982).

property at a rate "from 5,672.56 to 6,511.06 percent in excess" of the rate applied to property owned by others and found to be comparable in every pertinent respect. App. 40a. Such disparity did not result from errors in judgment or the exercise of discretion. It resulted from a discriminatory plan. The sheer magnitude of the discrimination sanctioned by the court below should prompt review by this Court.

But more is at stake here than a palpably unjust result. As might readily be supposed, the court below was compelled to depart from legal principles established by this Court before it could conclude that the dramatic disparities in taxation found by the Circuit Court were fully consistent with the Fourteenth Amendment guarantee of equal protection. The court below ruled that petitioners were not subject to intentional and systematic discrimination because their property was not assessed at more than its actual value and they were free under state law to seek to *raise* the assessments of any relatively undervalued properties owned by others. App. 7a-9a.

This Court has clearly held, however, that the fact that a given taxpayer's property is assessed at its actual value is no defense to an equal protection challenge to the lower assessment of comparable property, and that a taxpayer who is subject to such discriminatory assessment cannot be relegated to attempting to raise the assessments of comparable properties owned by other taxpayers. *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923). This Court has also held that disparate taxation is "intentional and systematic"—and thus in violation of the Fourteenth Amendment—when clearly disparate assessments are "made pursuant to a deliberately adopted system," and result not from possible errors of judgment but from the system itself. *Cumber-*

land Coal Co. v. *Board of Revision*, 284 U.S. 23, 25 (1931). Here, there is no dispute that the disparate assessments were caused by the assessor's deliberate policy of reassessing recently purchased property at the purchase price, and not reassessing unsold comparable property.

This case turns on legal principles; there is no dispute about the facts. All of the facts pertinent to this Petition were findings by the Circuit Court, undisturbed on appeal. Most of them were stipulated to below by the parties. *See* App. 18a. And, in light of these undisputed facts, the significance of the principles is starkly presented. If we were to pose a hypothetical in which taxpayers A and B owned properties comparable in every way, but A was taxed at ten times the level of B, the Court would assume that the hypothetical was exaggerated in order to present the legal issue clearly. Yet the discrimination in the hypothetical pales before the facts of this case; the legal issues are clearly presented on these undisputed facts; and the legal issues obviously have broad significance.

Thousands of state and local jurisdictions impose *ad valorem* property taxes, and challenges alleging discrimination in the levying of such taxes arise with considerable frequency. Some time ago this Court, confronted with numerous such challenges, established the basic principles governing the disposition of these cases. Key among these: discrimination caused by a deliberately adopted system—rather than mere errors of judgment—violates the Fourteenth Amendment, property owners assessed on the full value of their property are nonetheless discriminated against when others are taxed on less than the full value, and such taxpayers are entitled to have their assessments lowered to the prevailing level and cannot be relegated to having the assessments of all other property owners raised. If the decision below is permitted to stand, these principles will be cast into doubt,

with resulting confusion concerning the relation between Federal constitutional rights and state tax practices.

I. The Court Below, By Ignoring This Court's Precedents, Sanctioned Intentional And Systematic Discriminatory Taxation

This Court has long recognized that "the equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough* v. *Cromwell*, 326 U.S. at 623. Discriminatory treatment can inhere not only in disparate rates of taxation, but also in the disparate assessment of comparable property subject to the same tax rate. Given two comparable parcels of property assessed at $1,000, taxing one at 5 percent, for a tax of $50, and the other at 10 percent, for a tax of $100, would clearly contravene the constitutional guarantee of equal treatment. The same result obtains, both as a practical and a constitutional matter, if a uniform 10 percent rate is applied to both parcels, but one is assessed for tax purposes at $500, yielding a tax of $50, while the other—comparable in every pertinent respect—is assessed at $1,000, yielding a tax of $100. As Justice Brandeis noted for the Court in *Southern Railway Co.* v. *Watts*, 260 U.S. 519, 526 (1923), "[t]he rule is well settled that a taxpayer, although assessed at not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others."

As the holding just quoted demonstrates, unequal taxation of property is not immunized from constitutional scrutiny simply because the property of the disfavored taxpayer is "assessed at not more than full value." The court below emphasized that the price paid by petitioners for their property was an appropriate measure of the property's value, App. 7a, and petitioners do not dispute

that assertion here. The fact that petitioners' property may be assessed on the basis of its actual value, however, is completely irrelevant in considering an equal protection challenge. The point is that comparable property owned by others is *not* assessed on the basis of *its* actual value, but at a far lower level. As the dissenting justices pointed out below, "the quest for true value [cannot] override the *constitutional* requirement that taxation be equal and uniform." App. 10a (emphasis in original).

This Court has frequently reiterated that the Equal Protection Clause protects taxpayers from discriminatory property taxation, even if they themselves are not assessed on more than the actual value of their property.[6] This proposition would seem self-evident from the very nature of the equal protection guarantee, which is concerned not with the substantive terms on which a State taxes but simply that the State not discriminate among similarly situated taxpayers. Indeed, the logic of the court below would find no equal protection violation if a State chose to impose a property tax on only one taxpayer, so long as the tax were not based on more than the actual value of that unfortunate taxpayer's property.

Courts properly accord considerable deference to valuation decisions, in light of the often complex questions of judgment that surround any effort to ascertain value, and respondent and the court below relied heavily on this

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[6] *See, e.g., Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. at 445-446; *Iowa—Des Moines National Bank* v. *Bennett*, *supra*; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350, 352-353 (1918); *Greene* v. *Louisville & Interurban R.R. Co.*, 244 U.S. 499 (1917); *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517, 539-540 (1933). *See also* Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 Harv. L. Rev. 1374, 1375 (1962) ("the Court repeatedly has held that discrimination between parcels within the same class may indeed constitute a denial of equal protection. This requirement of intraclass equality will prevail in any conflict with a state's provision for full-value assessment").

principle of deference. But deference to the judgment of the assessor is simply not at issue in this case. Petitioners are not suggesting that this Court or any other set itself up as a board of review to second-guess the judgment of assessors concerning the value of particular parcels of property. The dramatic disparity in valuation established as a matter of record here resulted not from any exercise of judgment or discretion by the assessor, but precisely because the assessor deliberately elected *not* to exercise *any* judgment or discretion.

The findings of the Circuit Court—undisturbed by the Supreme Court of Appeals—are quite explicit on this point. The Circuit Court found that "the assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." App. 29a, 59a. The disparity in assessments was in fact not based on any arguable differences among the parcels, and the assessor did not contend that it was. App. 30a, 59a.

> The assessor admitted on examination that she did not, in making her appraisement, physically inspect or view the petitioners' real estate, that she had not compared it to adjacent or contiguous tracts, that no scientific examinations or tests had been made or performed, by her or at her request or direction, and that appraisements had not been sought or considered * * *. [App. 30a, 59a.]

This is thus emphatically not a case in which any question of deference to the judgment of the assessor is involved.[7]

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[7] Nor is it a case involving any question of the reasonableness of state classifications. There is no issue in this case of different assessment rates or valuation procedures based on any classification of property under state law. *See Weissinger v. Boswell*, 330 F. Supp. 615, 622 (M.D. Ala. 1971) (three-judge court); *Louisville & Nashville R. Co.* v. *Public Service Comm'n*, 249 F. Supp. 894 (M.D. Tenn. 1966), *aff'd*, 389 F.2d 247 (6th Cir. 1968).

This Court has held that discrimination in state taxation does not contravene the Fourteenth Amendment unless it is "intentional and systematic." *Southern Railway Co.* v. *Watts*, 260 U.S. at 526. The purpose of the "intentional and systematic" test is to avoid intrusion into state tax practices on the basis of disparities that are occasional and sporadic, or the result of mere errors in judgment.

The decision of three of the five justices below was based on a misunderstanding of what the "intentional and systematic" test requires. It does not require proof that the taxing authorities were actuated by evil motives, or that they deliberately manipulated the data. This Court made that clear in *Cumberland Coal Co.* v. *Board of Revision*, *supra*. There the Court concluded that a tax assessor's policy of arriving at a single valuation figure for all coal property in the jurisdiction constituted intentional and systematic discrimination in violation of the Fourteenth Amendment:

> There is no question that the assessments under review were made pursuant to a deliberately adopted system. The case is not one of mere errors in judgment in following a proper method, but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity. [284 U.S. at 25 (citations omitted).[8]]

So too here there is no question that the challenged assessments were made "pursuant to a deliberately adopted

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[8] As one state Supreme Court put it, there is systematic discrimination whenever each appraisal is not "part of a systematic and definite plan which provides that all similar properties be valued in a like manner." *Ernest W. Hahn, Inc.* v. *County Assessor*, 92 N.M. 609, 592 P.2d 965, 969 (1978). Even regularly *excusing* from taxation all taxpayers except a particular one constitutes systematic discrimination for purposes of the Fourteenth Amendment. *See Gosnell Development Corp.* v. *Arizona Dept. of Revenue*, 744 P.2d 451, 453-454 (Ariz. App. 1987).

system." It is undisputed that the assessor, adhering to the "welcome stranger" approach, valued recently-conveyed property at the value declared in the deeds, without raising the assessment of comparable property to that level. Even the three majority justices acknowledged that this was "the policy of the assessor's office during the relevant time period" and that "this method was uniformly followed." App. 6a. Again, as in *Cumberland Coal*, this is not a case of "mere errors in judgment"; the policy adopted by the assessor substituted for any exercise of judgment.

Other state courts of last resort have held that disparities in valuation caused by policies such as that adopted by the assessor in this case constitute unlawful taxation. For example, in *Duval* v. *City of Manchester*, 286 A.2d 612 (N.H. 1971), the Supreme Court of New Hampshire considered a case distinguishable from the present one only in that the disparity in valuation is so much greater here. In *Duval*, the assessor—like the assessor here—"adopted a procedure of reassessing parcels of property which were sold during the preceding year." *Id.* at 613. The result was that, as here, "the plaintiffs were required under their reassessment to pay taxes which were in fact disproportionately higher in relation to the true value of their properties than was the case as to other property owners in the city." *Id.* Unlike the court below, the *Duval* court concluded that when "plaintiffs' property was reappraised merely because it had been sold"—with the resulting disparities in valuation compared to unsold property—"the plaintiffs have met their burden." *Id.*

Board of Assessors of Weymouth v. *Curtis*, 375 Mass. 493, 378 N.E.2d 655 (1978), considered a similar problem. In *Curtis*, property was valued for tax purposes in 1968, and thereafter a particular parcel was revalued only if improvements were made to that parcel. *Id.* at 657. This "welcome improver" doctrine is indistinguish-

able, for purposes of the intentional and systematic test, from the "welcome stranger" doctrine at issue here and in *Duval*. The court in *Curtis* held that, in light of the disparities in valuation caused by this assessing practice, the taxpayers had carried their burden of establishing illegal discrimination:

> While the practice of not revaluing individual properties after the 1968 revaluation, unless improvements were made, may be an acceptable method of maintaining a fair assessment balance between unimproved properties, it is certainly prejudicial to those properties, like the parcels in question in the instant cases, that for one reason or another are reassessed after 1968 at figures equal to their full value as of the time of assessment. [*Id.* at 660.]

These cases and others demonstrate that when disparities in state taxation result from a particular assessment approach or policy—here, the "welcome stranger" approach —as opposed to the exercise of the assessor's judgment in appraising particular parcels, the "intentional and systematic" test is met. The point was clearly made in the leading case of *Sparks* v. *McCluskey*, 84 Ariz. 283, 327 P.2d 295 (1958). The assessor applied a new formula to determine the value of property on certain streets, which resulted in increases in assessments of from 300 to 1600 percent, while simply carrying forward the assessments of other comparable property. The state Supreme Court found that the increased assessments "were made intentionally and systematically" and were disproportionately excessive, and accordingly held that they were "illegal assessments because of their discriminatory character." *Id.* at 296-297. As the court concluded:

> There is no necessity of proving actual fraud. There is no indication of any dishonest motives on the part of any of these officials. We are satisfied that there were none but if the result of these intentional acts is discrimination the assessments cannot stand ir-

> respective of honest motives. * * * Nor is it a question of mere misjudgment of the assessing officials as to values; it is a question of an intentional overassessment of a portion of a certain class of property in specified areas as compared with assessment of like property in the rest of the county. [*Id.* at 297.]

Many cases have found unlawful discrimination in property tax assessments when reappraisals reach only a segment of property owners, even if all owners will eventually be subject to reappraisal. The assessor in *Sparks*, for example, asserted that he would, eventually, apply the new formula to all property. The court held that that fact could not save the unconstitutional discrimination:

> We cannot subscribe to the proposition that grossly unequal values by the use of a specified method of assessment may be placed on a small portion of a class of property and remain subject to the disproportionately excessive value for an indefinite number of years in the future until the taxing officials can get around to using the same method upon the other like properties. [327 P.2d at 297.]

In *Ernest W. Hahn, Inc.* v. *County Assessor*, *supra*, the court rejected a similar claim, noting that at his current pace it would take the assessor 50 to 100 years to reappraise all property in the jurisdiction, and that any "cyclical program of revaluation * * * must be completed within a reasonably limited time." 592 P.2d at 968-969.

The present case, of course, is far worse. Here only a small segment of property—that which has recently been sold—is subject to reappraisal, without any plan to subject all property to eventual reappraisal. What is at issue here is not a cyclical reappraisal program but a Ponzi scheme, in which existing landholders are heavily subsidized on the tax rolls by new entrants. Equalization is not simply "an indefinite number of years in the

future"—itself sufficient to establish a constitutional violation—but in fact can *never* occur.[9]

II. The Holding Below That The Only Remedy Is To Raise The Assessments Of Other Taxpayers Directly Conflicts With Numerous Decisions Of This Court

The court below held that petitioners could not seek to have their assessments lowered to prevailing levels but must instead cure any unconstitutional discrimination by attempting to have the assessments of all other taxpayers raised. Quoting from a recent decision of its own, the court concluded that " 'taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced *as long as their property is valued at market value.* Instead, they should seek to have the assessments of other taxpayers raised to market value.' " [10]

This holding was critical to the court's ultimate disposition of petitioners' claim. The court's conclusion that petitioners were not subject to unconstitutional discrimination was based on the fact that their property was not assessed at greater than true market value, *and* the court's view that any inequality due to assessment of other property at lower than true market value could be cured by raising the assessment of the other property. App. 8a-9a.

This latter holding—on which the ultimate disposition depends—directly conflicts with several decisions of this Court, which first addressed the issue at length in *Sioux*

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[9] Indeed, as the Circuit Court noted, even if the assessments of petitioners' property were frozen, it would take *over 500 years* for the *de minimis* increases in the assessments of other comparable property to catch up with petitioners' present assessments. App. 28a; *see* App. 58a.

[10] App. 9a (quoting *Killen* v. *Logan County Comm'n*, 295 S.E. 2d at 709) (emphasis in decision below).

City Bridge Co. v. *Dakota County*, *supra*. In that case county assessors assessed a company's property at 100 percent of its true value, while assessing all other property at 55 percent. The Nebraska Supreme Court, like the court below in this case, held that "when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced." 105 Neb. 843, 848. This Court unanimously reversed. Chief Justice Taft, writing for the Court, concluded that the result reached by the Nebraska Supreme Court would effectively deny the injured taxpayer any remedy at all.

> This Court holds that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. [260 U.S. at 446.]

This Court has adhered to this view, without so much as a solitary dissent, ever since. In *Iowa-Des Moines National Bank* v. *Bennett*, *supra*, for example, the Court reversed a decision by the Iowa Supreme Court that a taxpayer who was discriminated against must proceed under state law to raise the taxes of those who were unfairly favored. Justice Brandeis, writing for a unanimous Court, emphasized that

> it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have

> paid. * * * Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. [284 U.S. at 247.]

Again, in *Hillsborough* v. *Cromwell*, *supra*, a unanimous Court recognized that the Fourteenth Amendment protects taxpayers from discriminatory state taxation, and held that a state remedy that restricted the complaining taxpayer to proceedings to raise the taxes of others "is not adequate to protect [the taxpayer's] rights under the federal Constitution." 326 U.S. at 624. The Court acknowledged that the right at issue was the right to equal treatment, and that the taxpayer could not object if equality were achieved by raising the taxes of others rather than lowering his own. "The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." *Id.* at 623 (citing cases).[11]

Many courts have understood and applied this Court's rulings and struck down discriminatory state tax practices. For example, in *Louisville & Nashville R. Co.* v. *Public Service Comm'n*, 631 F.2d 426 (6th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981), the court found intentional and systematic discrimination in violation of the Fourteenth Amendment when the complainant was taxed on the basis of 100 percent of the actual value of its property, while other taxpayers were taxed on a median basis of 63 percent of actual value.[12] The court specifically held that, under *Hillsborough* v. *Cromwell*, the tax-

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[11] Although petitioners relied heavily upon these precedents in arguments before the West Virginia Supreme Court of Appeals, that court did not distinguish this Court's decisions, or even cite them.

[12] The successful complainant's property in *Louisville & Nashville R. Co.* was thus assessed at a level some 50 percent higher than that of other taxpayers, compared to the 6,500 percent figure in this case. App. 40a.

payer could not be relegated to attempting to raise the assessments of other taxpayers. 631 F.2d at 432. Again, in *Weissinger* v. *Boswell*, *supra*, the three-judge District Court found a violation of the Fourteenth Amendment when the complainants' property was taxed at 30 percent of its actual value, while other taxpayers' property was taxed at a median 17 percent of actual value. As the court concluded, "this lack of uniformity has resulted not from mere mistake or error in judgment, but from the intentional and systematic refusal of [the assessors] to perform their duties in accordance with state law." 330 F. Supp. at 622 (footnote omitted).

Many state courts have also correctly applied this Court's precedents.[13] To cite a very recent example, the Missouri Supreme Court held that assessing one taxpayer's property at 33⅓ percent of its value, compared to an average for comparable property of 20.9 percent, violated the Fourteenth Amendment guarantee of equal protection. *Savage* v. *State Tax Comm'n*, 722 S.W.2d 72 (1986) (en banc). The court concluded that "[s]uch a disparity is so grossly excessive as to be entirely inconsistent with an honest exercise of judgment and has the effect of intentional discrimination." *Id.* at 79.[14]

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[13] *E.g.*, *Boothe Fin. Corp.* v. *Lindley*, 6 Ohio St. 3d 247, 452 N.E.2d 1295, 1297-98 (1983), *cert. denied*, 464 U.S. 1057 (1984); *State ex rel. Douglas* v. *State Bd. of Equalization & Assessment*, 205 Neb. 130, 286 N.W.2d 729, 731-733 (1979); *District of Columbia* v. *Green*, 310 A.2d 848, 857 (D.C. App. 1973); *Southern Bell Tel. & Tel. Co.* v. *County of Dade*, 275 So. 2d 4 (Fla. 1973) (taxpayer constitutionally entitled to recover overpayments where its assessment level demonstrated in study to be above median level of others). In a decision post-dating the one below, the Supreme Court of Wyoming struck down as unconstitutional under the state constitution varying property tax assessment ratios, using principles the court said were equally applicable to the Fourteenth Amendment. *Rocky Mountain Oil & Gas Ass'n* v. *State Bd. of Equalization*, No. 87-194 (Dec. 31, 1987).

[14] The disparity found by the Circuit Court in the present case is more than *thirty times* the disparity found by the *Savage* court to be "grossly excessive." *See* App. 40a.

There is still, however, apparently some confusion over a number of the principles enunciated by this Court. The Maryland courts, for example, have taken the position that if a taxpayer is overtaxed, his only remedy is to force the authorities to raise the taxes of others similarly situated.[15] And in a Kansas case, as pointed out in the opinion dissenting in part, the majority thought that reducing the applicant's taxes would be unfair to those other taxpayers who had been assessed at the same rate.[16] A New Jersey intermediate court has ruled that a taxpayer can sue based either on its own overassessment or to correct the underassessment of other taxpayers, *Atrium Development Corp.* v. *Continental Plaza Corp.*, 214 N.J. Super. 639, 520 A.2d 827, 828 (1987), but the state Supreme Court has granted review of that decision. 107 N.J. 167, 526 A.2d 222 (1987). The Tennessee Supreme Court, like the court below, apparently restricts taxpayers who are relatively overassessed to actions to raise the assessments of other taxpayers. *See, e.g., Biltmore Hotel Court* v. *City of Berry Hill*, 216 Tenn. 62, 390 S.W.2d 223 (1965).

The instant case presents an ideal vehicle for the Court to clarify its rulings and to reaffirm the principles repudiated by the court below.

III. The Questions Presented Are Important And Recurring, And Need To Be Resolved

State and local governments throughout the country are heavily dependent upon the revenue they gain from

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[15] *See Borden* v. *Director, State Dept. of Assessments and Taxation*, 19 Md. App. 112, 309 A.2d 773, 778-779 (1973) (discussing cases), *cert. denied*, 416 U.S. 940 (1974); *Samet* v. *Supervisor of Assessments*, 290 Md. 357, 430 A.2d 73, 75-76 (1981) (purporting to rely on this Court's decisions in *Sunday Lake Iron Co., supra*, and *Sioux City Bridge, supra*).

[16] *Northern Nat. Gas Co.* v. *Williams*, 208 Kan. 407, 493 P.2d 568, 589-590, *cert. denied and app. dism'd*, 406 U.S. 964, 967 (1972).

property taxes. In 1985, state and local governments collected some $104 billion in property taxes, more than twice the amount collected a decade before. Property taxes account for 74 percent of all revenue for local governments.[17] With cutbacks in federal assistance, property taxes will play an even greater role as sources of revenue for state and local government in the years ahead.[18]

At the same time, the burden of property taxes on landowners has also risen. From 1970 to 1984, property taxes have increased, on a per capita basis, more than 240 percent.[19] The result has been several well-publicized "tax revolts," and practical as well as formal limitations on the authority of state and local officials to raise tax rates.[20]

State and local governments thus find themselves confronted with a dilemma: they need sources of new revenue in an era of economic readjustment, but cannot readily increase the tax burden on existing taxpayers. The decision below, if permitted to stand, offers the alluring shortcut out of this quandary of taxing newcomers to the jurisdiction at much higher levels than existing landowners. This "welcome stranger" approach yields increased revenue without raising taxes on existing landowners, the "friends and neighbors" of the taxing officials. App. 40a, 72a.

This is a "shortcut," however, around the Fourteenth Amendment guarantee of equal protection. Neither hardship on the State from having to give up taxes not truly owed by the taxpayer nor hardship on other taxpayers

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[17] *Tax Features*, vol. 31, no. 6, at 2 (Tax Foundation, Sept. 1987).

[18] *See* Farber, *supra*, 4 W. Va. Pub. Interest L. Rep. at 12.

[19] Census Bureau, *Statistical Abstract of the United States 1987* at 258.

[20] *See* Lowery, *After the Tax Revolt: Some Positive, If Unintended, Consequences*, 67 Soc. Sci. Q. 736 (1986).

from having to pay taxes required to equalize disparate treatment [21] can relieve the State of its obligations to take appropriate action to eliminate discrimination. The court below upheld the dramatic disparity in taxation clearly shown by the record in this case only by ignoring this Court's holdings that taxpayers assessed at full value suffer unconstitutional discrimination when other taxpayers are assessed at less than full value, that such discrimination is "intentional and systematic" when it results from a deliberately adopted assessment system, such as the "welcome stranger" approach, and that a taxpayer who is overassessed cannot be forced to raise the assessments of all other taxpayers to obtain relief.

Here, there is a highly-developed and undisputed record setting forth the disparities in valuation. The record also clearly establishes that the sole basis for the disparities is the "welcome stranger" approach; the Circuit Court found that there were no differences between the properties that could explain the startling disparities. The legal questions are thus presented in stark relief and require reversal.

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[21] *See Gosnell Development Corp.* v. *Arizona Dept. of Revenue*, 744 P.2d at 452.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 17315

IN RE 1975 TAX ASSESSMENTS
AGAINST ONEIDA COAL CO., *et al.*

July 17, 1987

Dissenting Opinion Sept. 18, 1987

Syllabus by the Court

1. " e equal and uniform clause of Section 1 of Article X of the West Virginia Constitution requires a taxpayer whose property is assessed at true and actual value to show more than the fact that other property is valued at less than true and actual value. To obtain relief, he must prove that the undervaluation was intentional and systematic." Syl. pt. 1, *Kline v. McCloud*, —— W.Va. ——, 326 S.E.2d 715 (1984).

2. "The price paid for property in an arm's length transaction, while not conclusive, is relevant evidence of its true and actual value. Such evidence may not be rejected in favor of a Tax Commissioner's old appraisal." Syl. pt. 2, *Kline v. McCloud*, —— W.Va. ——, 326 S.E. 2d 715 (1984).

3. "The term 'value' as used in article 10, section 1 of the West Virginia Constitution, means the 'worth in

money' of a piece of property-its market value." Syl. pt. 3, *Killen v. Logan County Commission*, —— W.Va. ——, 295 S.E.2d 689 (1982).

4. "It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear." Syl. pt. 7, *In re Tax Assessments Against Pocahontas Land Co.*, —— W.Va. ——, 303 S.E.2d 691 (1983).

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Ernest V. Morton, Jr., Webster Springs, for Allegheny-Pitt.

Dan O. Callaghan, Richwood, for Allegheny-Pitt Coal & East Ky. Energy.

W.T. Weber, Jr., Weston, for Shamrock Coal Co. and Oneida Coal.

PER CURIAM:

This is an appeal by the County Commission of Webster County from orders entered by the Circuit Court of Webster County reducing the assessed valuation of certain real estate for the purpose of *ad valorem* taxation. By agreement of the parties, several cases involving the same issue of tax assessments based on deed values for different appellees have been consolidated for purposes of this appeal.

The circuit court issued the rulings now before us in cases brought by several landowners challenging the valuation placed on their respective properties by the Assessor for Webster County (hereinafter assessor) and upheld by the County Commission of Webster County sit-

ting as the Board of Equalization and Review[1] (hereinafter board of review) for the tax years 1976 through 1986. The appellee taxpayers are the following coal corporations who own both fee and mineral estates in Webster County: Allegheny-Pittsburgh Coal Company (hereinafter Allegheny-Pittsburgh) for valuations during the years 1976 through 1983; Shamrock Coal Company, Inc. (hereinafter Shamrock) and Oneida Coal Company, Inc. (hereinafter Oneida) for valuations during 1981 through 1986; and East Kentucky Energy Corporation (hereinafter East Ky. Energy) for valuations during the years 1984 through 1986.

Allegheny-Pittsburgh owned 7,374 acres of property in fee, surface, minerals, or various combinations of these estates, which it purchased in September, 1974, for a total consideration of $24,624,500, as shown by the declaration of consideration of value in the various deeds. For the tax years 1976 through 1983 this property was assessed annually at $12,312,250, or 50% of the purchase price listed as consideration in the original deeds.[2]

On July 15, 1982, Allegheny-Pittsburgh sold its property in Webster County to appellee, East Ky. Energy, for $29,842,500, and the annual assessed valuation thereafter was $14,921,250, which represented 50% of the purchase price as contained in the 1982 deed.

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[1] *W.Va.Code*, 11-3-24 [1979] provides: "The county commission shall annually, not later than the first day of February, meet for the purpose of reviewing and equalizing the assessment made by the assessor."

[2] "*W.Va.Code*, 18-9A-11 (1972) read *in pari materia* with *W.Va. Code*, 11-3-1 (1972) gives the assessor discretion to set the assessed value of property between fifty and one hundred percent of the appraised value." *In re Assessment of U.S. Steel*, 165 W.Va. 373, 377, 268 S.E.2d 128, 131 (1980). In 1981, *W.Va.Code*, 18-9A-11(f) was amended to provide that beginning July 1, 1981, the assessed valuation would be not less than 60 percent of the appraised valuation. *See also* note 3, *infra*. There is no allegation in the present case that the assessor applied different *rates* of assessment to the appellees' property as occurred in *U.S. Steel, supra*.

Appellees Oneida and Shamrock are wholly owned subsidiaries of Elk River Resources, Inc. On May 12, 1981, Shamrock conveyed 7,783 acres of coal in Webster County to Oneida without consideration as a result of the companies' corporate affiliation. The assessment on this property for tax years 1981 through 1986 was derived from the purchase price paid when Shamrock acquired the property on December 21, 1977, from Preston W. Carroll and his wife, as well as other properties situate in Braxton and Nicholas Counties. The assessor appraised the proportionate Webster County share of this conveyance at $5,867,600 and the assessed value at $2,933,800 or 50% of the appraisal value.

The appellees appealed the valuations by the board of review to the circuit court on the grounds that the assessments violated the equal and uniform clause of article X, section 1 of the West Virginia Constitution, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The appellees charged that the practice by the assessor and board of review of basing assessments on the consideration recited in deeds of conveyance intentionally discriminates against landowners who recently purchased property.

Article 10, section 1 of the West Virginia Constitution provides that "[s]ubject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law." *W.Va.Code*, 11-3-1 holds that:

> All property shall be assessed annually as of the first day of July at its true and actual value; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale. . . .

In syllabus point 3 of *Killen v. Logan County Commission*, —— W.Va. ——, 295 S.E.2d 689 (1982), we held that "[t]he term 'value,' as used in article 10, section 1 of the West Virginia Constitution, means the 'worth of money' of a piece of property-its market value." [3]

The appellees presented expert evidence that the true and actual value of their property is lower than the purchase price stated in the deeds of conveyance. The appellees are more concerned, however, with the undervaluation of comparable Webster County properties. The appellees therefore argue that the primary issue presented by this case is whether the assessments of their property and comparable properties are equal and uniform under the United States and West Virginia Constitutions. The appellees contend that the board of review should have adopted the valuation of coal appraisals recommended in 1975 by the State Tax Commissioner of $360 per acre for coal and $300 per acre for surface, or even lower figures presented by their experts.

For the coal property owned by Shamrock and then Oneida, proof was offered by witnesses that in 1984 the appraised value was $119 per acre for an aggregate value of $926,177. Appellee Oneida now asserts by cross assignment of error that the true and actual value is $119 per acre and not $360 per acre as recommended by the State Tax Commissioner and adopted by the circuit court below.

Appellees, Allegheny-Pittsburgh and East Ky. Energy, challenged the assessor's valuations by presenting evidence of the assessed value of comparable properties. Based on

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[3] Prior to *Killen*, assessors relied on *W.Va.Code*, 18-9A-11, to assess property at less than the true and actual value. After *Killen*, Section 1b of Article X to the West Virginia Constitution was adopted which set the assessed value of property at 60 percent of its true value. Under this section, the percentage of assessed value can be altered by two-thirds of the members elected to each Legislative House.

this comparison, East Ky. Energy contended before the board of review and circuit court that the appraisal value for all of its Webster County property should be $1,049,872.43 or $142.37 per acre, instead of the $29,842,-500 price paid to Allegheny-Pittsburgh in 1982. East Ky. Energy has not appealed the circuit court's final ruling regarding the value of its coal and surface property.

It was the policy of the assessor's office during the relevant time period to assess all recently transferred property on the basis of 50 percent of the declaration of consideration of value. There appears to be no dispute that this method was uniformly followed for all such property. With respect to property which had not been recently conveyed, the assessor testified that the assessed values were raised by ten per cent in the years 1976, 1982 and 1984. The appellees contend that the assessor failed to equally and uniformly apply the ten per cent increase to all relevant property.

The appellant county commission, which adopted the assessor's valuations of all appellees' property while sitting as the board of review, argued on appeal to the circuit court and in their petition now before this Court that the tax assessments reflect the "true and actual" value of appellees' property, and that the assessor's method of valuation was valid and was uniformly applied.

The trial court ruled that the assessor and board of review, while justified in making the initial assessments of appellees' property, based on the actual purchase price, subsequently violated the equal and uniform clause of article X, section 1 by failing either to raise the assessments of comparable property to appellee's level, or to lower appellee's assessments to the level of substantially similar coal property. The court chose to lower the appellee's assessment by ordering the substitution of the tax commissioner's appraisal value of $360 per acre for coal property and $300 per acre for surface property.

In *Kline v. McCloud*, —— W.Va. ——, 326 S.E.2d 715 (1984), the taxpayer, Westvaco Corporation, raised the same argument asserted by the appellees: use of recent deed values would violate the equal and uniform taxation clause of our State Constitution, *W.Va. Const.*, art. X, section 1. The petition in *Kline*, *supra*, was brought by citizens and taxpayers in Randolph County who had tried to have the appraisal of property owned by Westvaco Corporation raised to reflect the actual purchase price. In that case the Assessor of Randolph County testified that he routinely used the 1965 State Tax Department appraisal, regardless of sale price, in order to maintain equality of taxation.

In *Kline* we reversed the trial court holding that property cannot be appraised at a value higher than the State Tax Commissioner's appraisal and established the following rule in syllabus point 2: "The price paid for property in an arm's length transaction, while not conclusive, is relevant evidence of its true and actual value. Such evidence may not be rejected in favor of a Tax Commissioner's old appraisal."

The trial court in the case before us acknowledged that an assessment based on the purchase price paid by the appellees could be properly sustained under the rationale in syllabus point 2 of *Kline*, *supra*. Further, the appellees do not contend that the purchases of their respective properties were not "arm's length transactions." We, therefore, hold that the consideration paid by the appellees represents the "true and actual value" of their respective properties as set by the board of review.

We also held in syllabus point 1 of *Kline* that:

> The equal and uniform clause of Section 1 of Article X of the West Virginia Constitution requires a taxpayer whose property is assessed at true and actual value to show more than the fact that other property is valued at less than true and actual value.

> To obtain relief, he must prove that the undervaluation was intentional and systematic.

The remaining question presented by this case is whether the undervaluation of other property in Webster County was "intentional and systematic" as argued by the appellees. The court below held that the failure of the assessor and board of review to either raise other taxpayers' assessments or lower the appellees' property valuation constituted discriminatory treatment of the appellees which justified a substantial reduction of the appellees' appraisal.

"It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear." Syl. pt. 7, *In re Tax Assessments Against Pocahontas Land Co.*, —— W.Va. ——, 303 S.E.2d 691 (1983).

We find that the record does not support the trial court's ruling that the actions of the assessor and board of review constitute "intentional and systematic" discrimination. The assessments based upon the price paid for the property in arm's length transactions are an appropriate measure of the "true and actual value" of appellees' property.

The uniform use of recent deed values as the basis for appraising property subject to *ad valorem* taxation does not violate *W.Va. Const.*, art. X, § 1. Any dispute the appellees have with the assessments of other landowners in Webster County may be presented to the board of review. "[*A*]*ny* person who is aggrieved by *any* assessment shall have the right to appeal that assessment (if they have appeared and contested the valuation before the Board of Equalization and Review)." *Tug Valley Recovery Center, Inc. v. Mingo County Commission*, 164 W.Va. 94, 101, 261 S.E.2d 165, 170 (1979). (emphasis in original).

In *Tug Valley, supra,* we found support for this position in both *W.Va. Code,* 11-3-25, which holds, in part:

> Any person claiming to be aggrieved by any assessment in any land or personal property book of any county who shall have appeared and contested the valuation or whose assessment has been raised by the county court [county commission] above the assessment fixed by the assessor, or who contested the classification or taxability of his property may, at any time up to thirty days after the adjournment of the county court [county commission], apply for relief to the circuit court of the county in which such books are made out. . . .

and *W.Va.Code,* 18-9A-11 which holds in part:

> In the event the county commission shall fail or refuse to make the reallocation of levies as provided for herein, the county board of education, the tax commissioner, the state board, or any other interested party, shall have the right to enforce the same by writ of mandamus in any court of competent jurisdiction.

We concluded that "[t]his language makes it clear that 'any interested party' is allowed to compel proper assessment of all real estate in his home county. . . ." *Tug Valley, supra,* at 101, 261 S.E.2d at 170.

We addressed the very question raised by appellees in *Killen, supra,* and held at ——, 295 S.E.2d at 709: "In the future, taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced *as long as their property is valued at market value.* Instead, they should seek to have the assessments of other taxpayers raised to market value." (emphasis added).

Finally, we stated in reference to the facts in *Kline, supra,* at ——, 326 S.E.2d at 720:

> The present case is somewhat analogous to those situations where an assessor makes a partial reappraisal of property which results in such property receiving a higher value than other property or there is disparate valuation between tax districts. Courts have rather uniformly rejected equal protection and uniformity of taxation arguments in such cases.

Based on the above principles, we find no merit in Oneida's cross assignment of error and reverse the judgment of the Circuit Court of Webster County and remand this case for reinstatement of the tax assessments on appellees' property previously set by the board of review.

Reversed and remanded.

BROTHERTON, Justice, dissenting:

It appears to me that the tail is now wagging the dog in West Virginia property taxation. Our statute requires a county assessor to assess property at its true and actual value, and I would go beyond Syllabus Point 2 and say that the price paid for property in an arm's length transaction is the *best* evidence of actual value. I would not, however, let the quest for true value override the *constitutional* requirement that taxation be equal and uniform. There is neither equality nor uniformity when recent purchasers of property must pay tax based on current value while all other property owners pay tax based on low, outdated assessed values. Where, as in this case, the assessor has made only token attempts to bring similar property up to current value, the assessor is intentionally and systematically undervaluing the other property in violation of Article X, § 1 of the West Virginia Constitution.

While I recognize the need for improving the educational system in West Virginia, this improvement cannot constitutionally be achieved at the expense of a few taxpayers. Appraisal of all property at its true and actual

value must be achieved within the bounds of the "equal and uniform" provision of the constitution. The legislature has required full value assessment, W.Va. Code § 11-3-1 (1983), and the State Tax Commissioner is nearing completion of a statewide reappraisal program. This Court should not interfere in this process, which is legislative and administrative in nature. In my opinion, the holding in this case undermines any effort by the State Tax Commissioner to set uniform values, especially for mineral lands.

More fundamental than interference with the administrative process, however, is the majority's condonation of the discriminatory "reappraisal method" in this case. My legal objections to this system were more fully set out by Justice Neely in his dissent to the opinion in *Kline v. McCloud*, —— W.Va. ——, 326 S.E.2d 715 (1984). For these reasons, I respectfully dissent, and I am authorized to say that Justice Neely joins me.

APPENDIX B

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 17th day of July, 1987, the following order was made and entered.

No. 17315

In Re: TAX ASSESSMENTS AGAINST ONEIDA COAL COMPANY, INC.; SHAMROCK COAL COMPANY, INC.; EAST KENTUCKY ENERGY CORPORATION; ALLEGHENY-PITTSBURGH COAL COMPANY

Upon an appeal from a judgment of the Circuit Court of Webster County rendered on November 22, 1985, January 31, 1986, February 20, 1986 and March 21, 1986.

The Court having maturely considered the motion for leave to move to reverse, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in said judgments. It is therefore considered and ordered by the Court that the judgments of the Circuit Court of Webster County rendered on November 22, 1985, January 31, 1986, February 20, 1986 and March 21, 1986, be, and the same are hereby, set aside, reversed and annulled, and that the appellant do recover of and from the appellees its costs about the prosecution of his appeal in

this Court in this behalf expended. AND this action is remanded to the Circuit Court of Webster County for reinstatement of the tax assessments on appellees' property previously set by the board of review, and further in accordance with the principles stated and directions given in the written opinion aforesaid and further according to law; all of which is ordered to be certified to the Circuit Court of Webster County.

The syllabus of points adjudicated, prefixed to the written opinion prepared Per Curiam, was concurred in by Chief Justice McGraw, and Justices Neely, Miller, and McHugh. Justice Brotherton dissents and would affirm the trial judge.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk
Supreme Court of Appeals

APPENDIX C

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 10th day of November, 1987, the following order was made and entered.

No. 17315

In Re: TAX ASSESSMENTS AGAINST ONEIDA COAL COMPANY, INC.; SHAMROCK COAL COMPANY, INC.; EAST KENTUCKY ENERGY CORPORATION; ALLEGHENY-PITTSBURGH COAL COMPANY

The Court having maturely considered the petition for rehearing and reargument filed in the captioned case is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk
Supreme Court of Appeals

APPENDIX D

IN THE CIRCUIT COURT OF
WEBSTER COUNTY, WEST VIRGINIA

IN RE:

Civil Action #2532

ALLEGHENY PITTSBURGH COAL COMPANY,
a corporation,

Civil Action #78-C-33

ALLEGHENY PITTSBURGH COAL COMPANY,
a corporation,

Civil Action #79-C-38

ALLEGHENY PITTSBURGH COAL COMPANY,
a corporation,

Civil Action #80-C-59

ALLEGHENY PITTSBURGH COAL COMPANY,
a corporation,

Civil Action #81-C-39

ALLEGHENY PITTSBURGH COAL COMPANY,
a corporation,

Civil Action #82-MISC-26

ALLEGHENY PITTSBURGH COAL COMPANY,
a corporation,

Civil Action #84-MSC-8

ALLEGHENY PITTSBURGH COAL COMPANY,
a corporation,

Civil Action #84-MSC-9

ALLEGHENY PITTSBURGH COAL COMPANY,
a corporation,

Civil Action #84-MSC-8

EAST KENTUCKY ENERGY CORPORATION,

Civil Action #84-MSC-9

EAST KENTUCKY ENERGY CORPORATION,

and

Civil Action #85-MSC-20

EAST KENTUCKY ENERGY CORPORATION

ORDER

These matters, consolidated before this Court by agreement of the parties, came before the undersigned upon appeal by the petitioners, corporate land owners and real estate taxpayers in Webster County, West Virginia, from the decision and order of the County Commission of Webster County, sitting as the Board of Equalization and Review, by which decision and order the assessment of petitioners' interest in the subject tracts and parcels of real estate, as fixed by the Assessor of Webster County, for the tax years in question was sustained.

The real estate in question consists of various tracts and parcels of surface, fee and mineral estate situate in Webster County, West Virginia. The various parcels of real estate of each of the petitioners, as will hereinafter appear, when combined as single parcels make up large boundaries.

Although the real estate of each of these petitioners is not identical to that of all other real estate in Webster County, it appears that petitioners' real estate is substantially similar to the real estate of the others in topography, location, access, development, mineral content and forestation, and that the petitioners' real estate is substantially similar to adjacent and contiguous tracts and parcels of real estate owned by others.

The petitioners, individually and collectively, contend that their real estate has been systematically valued,

assessed and taxed in violation of the "equal and uniform" requirement of Article X, Section 1 of the Constitution of West Virginia. They further maintain that, though the real estate owned by them is substantially the same as adjacent and contiguous real estate owned by others, the Assessor and the Board of Equalization and Review, by sustaining the assessment of petitioners' real estate, have systematically valued, assessed and taxed petitioners' real estate at a rate well in excess of the rate applied to adjacent and contiguous owners.

The petitioners assert that the rate of their respective valuations and assessments not only exceeds the rate of assessment applied to the real estate of adjoining and contiguous owners, but is also valued at approximately double the per acre value established by the 1975 appraisement of the State Tax Commissioner of West Virginia for substantially similar Webster County real estate. They further maintain that while their real estate is valued, and consequently assessed and taxed, at a per acre rate approximately twice that of the Tax Commissioner's 1975 appraisement for similar Webster County real estate, substantially similar parcels of adjacent and contiguous real estate owned by others is valued, assessed and taxed at a per acre rate considerably less than that applied to the petitioners and in fact less than the per acre rate for similar Webster County property by application of the Tax Commissioner's 1969 guide for the valuation and appraisal of coal properties.

Finally, the petitioners assert that the Assessor, over a period of years, has systematically valued, assessed and taxed petitioners' real estate at an excessive rate while refusing to increase to a like rate the assessment of substantially similar real estate lying adjacent and contiguous to that of petitioners, but owned by others.

The respondents contend that petitioners' real estate is properly valued, assessed and taxed.

THE FACTS

An examination of the evidence adduced before the Board of Equalization and Review, including transcribed testimony and designated exhibits, all of which were stipulated by the parties, reveals that the East Kentucky Energy Corporation, hereinafter referred to as East Kentucky, the petitioner in Civil Actions 84-MSC-8, 84-MSC-9, and 85-MSC-20, is a corporation organized under the laws of the Commonwealth of Kentucky, authorized to hold property and do business in West Virginia with its principal place of business at Glade Springs, Daniels, West Virginia.

It further appears that East Kentucky, by virtue of the deed of Allegheny Pittsburgh Coal Company dated July 15, 1982, and of record in the Office of the Clerk of the County Commission of Webster County, West Virginia, in Deed Book 195, at Page 318, is the successor in title to certain real estate formerly titled in the name of the Allegheny Pittsburgh Coal Company, the petitioner in Civil Actions 2532, 78-C-33, 80-C-59, 81-C-39, 82-MSC-26, 84-MSC-8, and 84-MSC-9, hereinafter referred to as Allegheny Pittsburgh, consisting of fee and mineral and sundry tracts of land situate on the waters of Birch River and Laurel Creek, in Glade District of Webster County, West Virginia.

The sum of Twenty-Nine Million, Eight Hundred Forty-Two Thousand, Five Hundred Dollars ($29,842,500.00), was the consideration declared in the deed from Allegheny Pittsburgh to East Kentucky.

The real estate conveyed to East Kentucky by Allegheny Pittsburgh had earlier been conveyed to Allegheny Pittsburgh by deeds dated September 1, 1984, September 19, 1974, and October 21, 1974 from Raymond C. Desrosier, and of record in the Clerk's Office in Deed Book 170, at Pages 510, 515 and 518, respectively and by deed dated October 2, 1974, from Ernest A. Desrosier et al,

and of record in Deed Book 170, at Page 500. The total consideration declared in the deeds to Allegheny Pittsburgh was Twenty-Four Million, Six Hundred Twenty-Four Thousand, Five Hundred Dollars ($24,624,500.00).

During the period from 1975 through 1984, the real estate was assessed as is set forth in stipulated "Exhibit C" copied and incorporated herein. The assessment for the year 1985 was identical to that of 1984.

From Exhibit C it appears that the petitioners, East Kentucky and its predecessor in title, Allegheny Pittsburgh, were, from 1975 through 1984, assessed for ad valorem taxes on nineteen tracts of fee, mineral and surface real estate.

The 1975 unweighted average per acre assessment of the nineteen tracts listed in Exhibit C, now owned by the petitioner, East Kentucky, was $66.93. The unweighted average per acre assessment in 1976 was $1,084.67, and in 1984, $1,209.66 per acre, for the nineteen parcels.

If parcels 4R-67, a 3.75 acre fee parcel, assessed in 1984 at $2,258.67, per acre, 4Q-6, a 1.5 acre surface parcel, assessed in 1984 at $1,540.00, per acre, 4Q-7, a 1.75 acre surface parcel, assessed in 1984 at $2,640.00, per acre, 4Q-71-1, a 00.31 acre surface parcel, assessed in 1984 at $4,967.74, per acre, 4Q-91, a 2.36 acre fee parcel, assessed in 1984 at $2,936.44, per acre, and 3P-12, a 5.1 acre parcel, less coal, assessed in 1984 at $272.55, per acre, are deleted from the nineteen parcels listed, the unweighted average per acre assessment of the remaining thirteen parcels is $643.71, including therein a 4,287 acre fee parcel, less oil and gas, with a 1984 per acre assessment of $3,109.54.

If parcel 4Q-16, an 83.5 acre mineral parcel, assessed in 1984 at $65.87, per acre, a per acre assessment roughly equivalent to that of a majority of the parcels listed in the Exhibit B and G comparables, discussed

EXHIBIT C

EAST KENTUCKY ENERGY CORP. PROPERTIES

ID	Plat No.	Land Book Entry	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	% Increase Assessments 1975-1984
2	4Q-16	83.5 A. Min.	1,260	5,000	5,000	5,000	5,000	5,000	5,000	5,000	5,000	5,500	
		Laurel Creek	(15.09)	(59.89)	(59.89)	(59.89)	(59.89)	(59.89)	(59.89)	(59.89)	(59.89)	(65.87)	337%
3	4P-1	4,287 A. Fee Less	171,490	10,889,190	10,889,190	10,889,190	10,889,190	10,889,190	10,889,190	10,889,190	10,889,190	13,330,580	
		O & G-Laurel Creek	(40.00)	(2,540.05)	(2,540.05)	(2,540.05)	(2,540.05)	(2,540.05)	(2,540.05)	(2,540.05)	(2,540.05)	(3,109.54)	7674%
4		620 A. Coal	15,500	217,000	217,000	217,000	217,000	217,000	217,000	217,000	217,000	238,700	
		Birch Waters	(25.00)	(350.00)	(350.00)	(350.00)	(350.00)	(350.00)	(350.00)	(350.00)	(350.00)	(385.00)	1440%
5	4Q-15	35.5 A. Fee	1,260	17,600	17,600	17,600	17,600	17,600	17,600	17,600	17,600	19,360	
		Laurel Creek	(35.49)	(495.77)	(495.77)	(495.77)	(495.77)	(495.77)	(495.77)	(495.77)	(495.77)	(543.35)	1437%
6	3Q-5	1,335 A. Fee	51,230	654,200	654,200	654,200	654,200	654,200	654,200	654,200	654,200	719,620	
		Birch & Beaver Cr.	(38.37)	(490.04)	(490.04)	(490.04)	(490.04)	(490.04)	(490.04)	(490.04)	(490.04)	(539.04)	1305%
7	3Q-9	21.5 A. Fee	770	10,780	10,780	10,780	10,780	10,780	10,780	10,780	10,780	11,860	
		Laurel Creek	(35.81)	(501.40)	(501.40)	(501.40)	(501.40)	(501.40)	(501.40)	(501.40)	(501.40)	(551.63)	1441%
8	4R-67	3.75 Fee	550	7,700	7,700	7,700	7,700	7,700	7,700	7,700	7,700	8,470	
		Welch Glade	(146.67)	(2,053.33)	(2,053.33)	(2,053.33)	(2,053.33)	(2,053.33)	(2,053.33)	(2,053.33)	(2,053.33)	(2,258.67)	1440%
9	4Q-6	1.5 A. Surface	150	2,100	2,100	2,100	2,100	2,100	2,100	2,100	2,100	2,310	
		Birch Waters	(100)	(1,400)	(1,400)	(1,400)	(1,400)	(1,400)	(1,400)	(1,400)	(1,400)	(1,540)	1440%
10	4Q-7	1.75 A. Surface	300	4,200	4,200	4,200	4,200	4,200	4,200	4,200	4,200	4,620	
		Birch Waters	(171.43)	(2,400)	(2,400)	(2,400)	(2,400)	(2,400)	(2,400)	(2,400)	(2,400)	(2,640)	1440%
11	4Q-71-1	00.31 A. Surf.	100	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,540	
		Welch Glade	(322.58)	(4,516.13)	(4,516.13)	(4,516.13)	(4,516.13)	(4,516.13)	(4,516.13)	(4,516.13)	(4,516.13)	(4,967.74)	1440%
12	45-91	2.36 A. Fee	450	6,300	6,300	6,300	6,300	6,300	6,300	6,300	6,300	6,930	
		Welch Glade	(190.68)	(2,669.49)	(2,669.49)	(2,669.49)	(2,669.49)	(2,669.49)	(2,669.49)	(2,669.49)	(2,669.49)	(2,936.44)	1440%
13		100 A. Coal	1,500	31,500	31,500	31,500	31,500	31,500	31,500	31,500	31,500	34,650	
		Beaver Creek	(15.00)	(315)	(315)	(315)	(315)	(315)	(315)	(315)	(315)	(346.50)	2210%
14	3P-15	540 A. Fee	13,500	396,900	396,000	396,000	396,000	396,000	396,000	396,000	396,000	436,590	
			(25)	(735)	(735)	(735)	(735)	(735)	(735)	(735)	(735)	(808.50)	3134%
15	4Q-15	82.48 A. Surf.	2,000	22,500	22,500	22,500	22,500	22,500	22,500	22,500	22,500	24,750	
		Laurel Creek	(24.75)	(272.79)	(272.79)	(272.79)	(272.79)	(272.79)	(272.79)	(272.79)	(272.79)	(300.08)	1138%
16		100 A. Min.	1,500	31,500	31,500	31,500	31,500	31,500	31,500	31,500	31,500	34,650	
		Beaver Creek	(15)	(315.00)	(315.00)	(315.00)	(315.00)	(315.00)	(315.00)	(315.00)	(315.00)	(346.50)	2210%
17	3P-14	48.5 A. Surf.	850	20,160	20,160	20,160	20,160	20,160	20,160	20,160	20,160	22,180	
		Beaver Creek	(17.53)	(415.67)	(415.67)	(415.67)	(415.67)	(415.67)	(415.67)	(415.67)	(415.67)	(457.32)	2510%
18	3P-12	5.1 A. Less Coal	70	1,260	1,260	1,260	1,260	1,260	1,260	1,260	1,260	1,390	
		Beaver Creek	(13.73)	(247.06)	(247.06)	(247.06)	(247.06)	(247.06)	(247.06)	(247.06)	(247.06)	(272.55)	1886%
19	3P-11	25 A. Less Min.	500	10,920	10,920	10,920	10,920	10,920	10,920	10,920	10,920	12,010	
		Beaver Creek	(20)	(436.80)	(436.80)	(436.80)	(436.80)	(436.80)	(436.80)	(436.80)	(436.80)	(480.40)	2302%
20	3P-13	12.75 A. Surf.	250	5,040	5,040	5,040	5,040	5,040	5,040	5,040	5,040	5,540	
		Beaver Creek	(19.61)	(395.29)	(395.29)	(395.29)	(395.29)	(395.29)	(395.29)	(395.29)	(395.29)	(434.51)	2116%

Note: Figures given to the left of each parcel reflect total assessment for that tract for year shown [upper figure], and per-acre assessment for that tract [lower figure in parentheses].

herein, the unweighted per acre assessment of the remaining twelve parcels rises to $691.86.

Although an unweighted per acre assessment of either $691.86, or $643.71, greatly exceed the per acre assessments, weighted or unweighted, of the Exhibit B and G comparables, the unweighted per acre assessments are not reflective of the true assessment of petitioner's thirteen largest parcels.

The weighted average per acre assessment of these parcels, determined by dividing the total assessed value of the thirteen parcels, $14,896,007.98, by the total acreage, 7,291.23, for 1984 is $2,043.00. During the years 1976 through 1983, the weighted average per acre assessment for these parcels was $1,688.64. For 1975, $35.88.

The petitioners, Allegheny Pittsburgh and East Kentucky, in support of their contention, that the real estate in question was, during a period from 1975 through 1985, systematically assessed in violation of the "uniform and equal" provision of the West Virginia Constitution Article 10, Section 1, offered in evidence stipulated "Exhibit B". This exhibit, hereinafter set forth, contains a list of nine parcels of comparable real estate, consisting of fee, surface and one parcel less the coal, situate in Glade District, Webster County, West Virginia, reflecting the total per acre assessment, in parenthesis, for each tract.

An examination of Exhibit B reveals that the 1975 unweighted average per acre assessment for the nine comparable parcels listed therein was $27.63. The unweighted average per acre assessment in 1976 was $36.32, in 1982, $118.35 and in 1984, $121.04.

The parcels included in the Exhibit B comparables range in size from the largest, a 5,558 acre fee parcel, assessed as parcel 2L-5 to M. B. Partners LTD, and situate on Birch River, to the smallest, a 13.6 acre fee par-

EXHIBIT B
Comparable Property List
[Glade District, Webster County, West Virginia]

ID	Plat No.	Land Book Entry	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	% Increase in Assessments 1975-1984
1	3Q-1	KNIGHT, James G. & L. K. INK 1,300 Fee Beaver Crk.	45,000 (35.00)	65,000 (50.00)	65,000 (50.00)	65,000 (50.00)	65,000 (50.00)	65,000 (50.00)	65,000 (50.00)	71,500 (55.00)	71,500 (55.00)	78,650 (60.50)	73%
2	4Q-13	CARPENTER, Dorsey R. & Dollie 357.66 Ac. Fee Gauley & Birch	11,970 (33.47)	19,200 (53.68)	19,200 (53.68)	19,200 (53.68)	19,200 (53.68)	19,200 (53.68)	28,400 (79.41)	28,400 (79.41)	28,400 (79.41)	28,400 (79.41)	137%
3	4N-13	MAYSE, Wayne & J. E. HOPKINS 173.0 Ac. Surf. Slab Camp Run	2,950 (17.05)	3,460 (20.00)	3,460 (20.00)	3,460 (20.00)	3,460 (20.00)	3,460 (20.00)	3,460 (20.00)	3,810 (22.02)	3,810 (22.02)	4,190 (24.22)	42%
4	2N-8	TIOGA LUMB. CO. 263.2 Fee Birch River	9,210 (34.99)	9,210 (34.99)	13,150 (49.96)	13,150 (49.96)	13,150 (49.96)	13,150 (49.96)	13,150 (49.96)	14,470 (54.98)	14,470 (54.98)	15,910 (60.45)	73%
5	3P-10	ANR COAL DEVELOPMENT CO. 50 Less Coal Beaver Creek	1,000 (20.00)	1,000 (20.00)	1,000 (20.00)	1,000 (20.00)	2,750 (55.00)	5,500 (110.00)	5,500 (110.00)	5,500 (110.00)	5,500 (110.00)	5,500 (110.00)	450%
6	2L-5	M. B. PARTNERS, LTD.—5,558 Fee Birch River	139,400 (25.08)	278,820 (50.17)	278,820 (50.17)	278,820 (50.17)	278,820 (50.17)	278,820 (50.17)	278,820 (50.17)	305,690 (55.00)	305,690 (55.00)	336,250 (60.50)	141%
7	3R-7	DEITZ, R. R. (Trustee) 486.94 Fee Strouds Creek	17,040 (34.99)	24,350 (50.01)	24,350 (50.01)	24,350 (50.01)	24,350 (50.01)	24,350 (50.01)	24,350 (50.01)	26,790 (55.02)	26,790 (55.02)	29,460 (60.50)	73%
8	3P/1-6-7-8	TULLY, J. M. 196.5 Ac. Surf. Beaver Creek	2,940 (14.96)	2,940 (14.96)	3,940 (20.05)	3,940 (20.05)	14,700 (74.81)	14,700 (74.81)	14,700 (74.81)	16,170 (82.29)	16,170 (82.29)	16,170 (82.29)	450%
9	3P-9	ANR COAL DEVELOPMENT CO. 13.6 Fee, Bvr. Ck.	450 (33.09)	450 (33.09)	450 (33.09)	450 (33.09)	3,750 (275.74)	7,500 (551.47)	7,500 (551.47)	7,500 (551.47)	7,500 (551.47)	7,500 (551.47)	1567%

NOTE: Figures given to the left of each parcel reflect total assessment for that tract for year shown (upper figure) and per-acre assessment for that tract (lower figure in parentheses).

cel assessed to ANR Coal Development Co. as parcel 3P-9, and situate on Beaver Creek. With exception of a 50 acre parcel, 3P-10, also assessed to A.N.R. Coal Development Co., the remaining six parcels included within the Exhibit B comparables are all parcels exceeding 100 acres in size, the largest of the six being parcel 3Q-1, a 1,300 acre fee parcel situate on Beaver Creek.

In 1975, when the unweighted average per acre assessment for Exhibit B comparables stood at $27.63, parcel 3Q-1, a 1,300 acre fee parcel on Beaver Creek, assessed in the names of James G. Knight and L. K. Ink, then assessed at $35.00 per acre, bore the highest assessment. Parcel 3P/1-6-7-8, a 196.5 acre surface tract on Beaver Creek, assessed to J. M. Tully, was low at $14.96, per acre. Parcel 2L-5, the M. B. Partners, LTD, 5,558 acre fee parcel was then assessed at $25.08 per acre. Parcel 3P-9, the 13.6 acre parcel now assessed to A.N.R. Coal Development Co., was then assessed at $33.09 per acre.

Between 1975 and 1984 the unweighted average per acre assessment of the Exhibit B comparables rose from $27.63 to $121.04. In 1984, parcel 4N-13, a 173.0 acre surface tract on Slab Camp Run, assessed to Wayne Mayse and J. E. Hopkins, was assessed at $24.22 per acre. The 13.6 acre parcel assessed to A.N.R. Coal Development Co. bore the high assessment of the Exhibit B comparables at $551.47 per acre.

Between 1975 and 1984, the James G. Knight and L. K. Ink, 1,300 acre tract, parcel 3Q-1, per acre assessment rose from $35.00, to $60.50. The assessment on the M.B. Partners LTD, 5,558 acre fee tract rose during this period from $25.08, to $60.50, per acre.

With the exception of parcels 3P-9 and 3P-10, both now assessed to A.N.R. Coal Development Co., at $551.47 and $110.00 per acre respectively, neither of the Exhibit B comparables rose to a per acre assessment in excess of $85.00, between 1975 and 1984.

A computation of the weighted average per acre assessment of the Exhibit B comparables reveals that these parcels, consisting of a total of 8,398.9 acres, were assessed at $27.38 per acre in 1975. In 1976 the weighted average per acre assessment of the Exhibit B comparables rose to $48.15 and in 1982, to $57.13 per acre.

By 1984 the 8,398.9 acres making up the Exhibit B comparables had a total assessed value of $522,030.00, giving a weighted average per acre assessment of $62.15.

While the weighted average per acre assessment of the thirteen largest parcels of Allegheny Pittsburgh-East Kentucky real estate was rising from $35.88, in 1975, to $1,688.64, in 1976, to $2,043.00 in 1984, the weighted average per acre assessments of the Exhibit B comparables, during the same years were $27.38, $48.15, and $62.15.

Although the petitioner's per acre assessment on parcel 4P-1, a 4,287 acre tract, less oil and gas, situate on Laurel Creek rose from $40.00 per acre in 1975, to $3,109.54 in 1984, the per acre assessment of the M.B. Partners, LTD, fee tract of 5,558 acres on Birch River, parcel 2L-5 rose from $25.08 in 1975 to only $60.50 in 1984. The per acre difference in 1984 assessment between these two parcels is $3,049.04.

In addition to the Exhibit B comparables the parties further stipulated and admitted as evidence, Exhibit G, E. V. Morton's updated list of comparable parcels of real estate.

The Exhibit G comparables, consisting of fifty parcels in 1975, and forty-eight parcels in 1984, is a list of parcels of real estate consisting largely of fee and surface parcels of various size but also including parcels of oil and gas and fee less the coal, all situate in Webster County, West Virginia, and substantially similar to petitioner's real estate.

The 1975 unweighted average per acre assessment of the Exhibit G parcels was $95.61. The unweighted assessment had risen to $145.29 in 1982 and in 1984, $148.91 for the forty-eight parcels then included.

The 1984 unweighted per acre average assessment of the forty-eight parcels included in the Exhibit G comparables included parcels 4Q-24-1, an 8,000 square foot parcel assessed at $2,777.78 per acre and 4Q-8, a .75 acre parcel assessed at $1,106.67, per acre. If these small parcels are omitted from the Exhibit G comparables, the unweighted per acre assessment for the remaining forty-six parcels is $69.20.

An examination of the Exhibit G comparables reveals that the total acreage of the fifty parcels listed in 1975 was 9,928.96. The weighted per acre average assessment for these parcels, with a total assessed value in 1975, of $277,520.00 was then $27.95.

The 1982, weighted per acre average assessment for the Exhibit G comparables, then consisting of forty-eight parcels comprising 9,767.76 total acres were $53.20 per acre.

In 1984, the total assessed value of the forty-eight Exhibit G parcels was $569,594.00. The weighted per acre assessed value of the 9,767.76 acres making up the forty-eight parcels listed was $58.31.

Between 1975 and 1984, the weighted per acre average assessment of the Exhibit G comparables rose $30.36, per acre from $27.95, to $58.31, per acre.

A comparison of the Exhibit C, B and G properties, for the tax year 1984, classified according to the interest owned, i.e., surface, fee, mixed or coal, also discloses the inconsistency apparent in a comparison of weighted, per acre, average assessments of these properties.

The 1984, weighted, per acre, average assessment for the Exhibit C surface properties, for instance, was

$423.41, per acre, for seven parcels. Six fee parcels assessed to petitioner, were assessed at $620.62, per acre, three mixed parcels, including the 4,287, acre parcel designated 4P-1, bore a weighted, per acre, average assessment of $2,990.88, while petitioners two coal only parcels listed on Exhibit C, were assessed at $379.65, per acre.

In contrast, the 1984, weighted, per acre, average assessment of the Exhibit B surface properties was $55.10, per acre, the six fee parcels $56.05, and the single mixed interest parcel, $110.00, per acre.

The 1984, weighted, per acre, average assessment for the Exhibit G comparables were: surface, twenty-two parcels, $55.98, per acre, fee, nineteen parcels, $61.32, per acre, and mixed, six parcels, $65.62, per acre. There are no coal only parcels listed among the Exhibit G comparables.

It is evident from the comparison of the weighted, per acre, average assessments of the petitioners' properties with the comparable properties listed in Exhibit B and G, whether the average assessments be of all the properties listed, without regard to the interest in real estate assessed, or the average, per acre, assessment, according to the particular interest assessed, that the increase in assessment of the properties listed on Exhibit C is substantially greater than the increased assessments of the Exhibit B and G properties.

A comparison of the assessment of petitioners' properties, Exhibit C, with the assessment of the Exhibit B and G properties, between the years of 1976, and 1984, likewise reveals a pattern of substantially greater assessments applied to petitioners' properties than was applied to the Exhibit B and G properties.

The transcripts of testimony, adduced in the various hearings before the Board of Equalization and Review, reveal that, though the assessor was aware that petitioners' real estate was being assessed at a rate substan-

tially greater than the assessment applied to similar real estate owned by others, it was the assessor's contention that the real estate of the petitioner, East Kentucky, and that of its predecessor in title, Allegheny Pittsburgh, was properly assessed at fifty per cent (now sixty) of the value set forth in the declaration of consideration appearing in petitioners' deeds.

The assessor maintained that all recently transferred property was uniformly and equally assessed at fifty per cent (now sixty) of the value declared in the most recent deed of conveyance to a taxpayer. According to the assessor, the declared consideration set forth in a deed conveying real estate in an arms length transaction between a willing buyer and a willing seller was the most accurate reflection of the market value of the real estate conveyed.

The assessor, though recognizing the fact that some real estate in Webster County, including that of the petitioners, was being assessed at a higher rate as a consequence of the consideration declared in the taxpayers deed, asserted that the assessment of property which had not been recently transferred, and therefore had a low, or no, declared value, had nevertheless been increased in assessment periodically, inferentially suggesting that over a period of time equalization would be accomplished through periodic increases in the assessment of property which had not recently changed hands. In support of this position, increases in the assessment of Webster County real estate, between the years of 1975, and 1984, were noted.

As examination of the increase in assessments of the Exhibit B, G and C properties between 1975, and 1984, discloses that the weighted, per acre, average assessment of the Exhibit B comparables increased a total of $34.77, per acre, over the nine year period. A yearly increase of $3.86, per acre.

The assessment of the Exhibit G properties, during this period, rose a total of $30.36, per acre, a yearly increase of $3.37 per acre.

By comparison, the petitioners' weighted, per acre, average assessment increased by $2,007.12, per acre, during the same period. In contrast to the yearly, per acre, average increases in the assessments of the Exhibit B and G properties, the assessment of petitioners' properties increased an average of $223.01, per acre, per year.

The increased assessment of the Exhibit B properties was 0.017, per cent and that of the Exhibit G properties was 0.015, per cent of the increase in the assessment of petitioners' properties.

During this period, the difference in the increase in the weighted, per acre, assessment between the Exhibit B and petitioners' (Exhibit C) properties was $1,908.85, per acre. The difference in increase in the weighted per acre assessment between the Exhibit G and Exhibit C properties was $1,984.69.

Though the assessor appeared to imply that increased assessments of the properties assessed low would eventually result in equalization, it is worthy of note that should the increased assessment applied to the Exhibit B properties between 1975 and 1984 be applied in like amount in the future a period of 513.17 years would be required for equalization with petitioners present assessment.

Equalization of the Exhibit C and Exhibit G properties, at the rate of increased assessment applied to the Exhibit G comparables over the past ten years would require a period of 588.92 years for equalization.

Should increased assessments be uniformly applied to the Exhibit B, C and G in the future equalization would, of course, never be accomplished. In fact, the difference between the assessments would become greater, not less.

In addition to Exhibits B, C and G the parties stipulated and agreed to the admission of Exhibit A, a map showing the real estate of the petitioners and that used as comparables in Exhibits B and G. From Exhibit A it is obvious that the real estate of the petitioners and that of contiguous, adjoining and adjacent landholders to which it is compared is substantially the same.

From the evidence it appears that in making the contested assessments the assessor did not compare the various features of the real estate to which the high assesment was applied with the various features of land assessed at a much lower rate.

It does not appear from the evidence that petitioners' Exhibit C real estate is topographically dissimilar to the real estate listed in Exhibits B and G. The assessor did not procure, examine or consider reports of engineers, surveyors, timbermen, oil and gas developers, real estate brokers or agents, or other persons possessing expertise in any particular field relating to real estate values in assessing petitioners' real estate.

The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon the Exhibit B or G properties.

The questioned assessments were not based upon present use or immediately foreseeable economic development of petitioners' real estate. The assessor did not consider the size, shape, location, access, or availability of public highways, sewers, water, gas or electricity in assessing either the petitioners' real estate or the real estate listed in the Exhibit B or G comparables.

The sole basis for the assessment of petitioners' real estate was, according to the assessor, the consideration declared in petitioners' deeds.

Upon examination, the assessor did not contend that petitioners' assessment was the result of unique or valuable features peculiar only to petitioners' land. The assessor admitted on examination that she did not, in making her appraisment, physically inspect or view the petitioners' real estate, that she had not compared it to adjacent or contiguous tracts, that no scientific examinations or tests had been made or performed, by her or at her request or direction, and that appraisements had not been sought or considered, including appraisements prepared by the State Tax Commissioner of West Virginia for use by assessors, in the performance of the duties of that office.

The assessor admitted on examination that, though she was aware of and had access to the Tax Commissioner's guide for assessors, in the valuation of coal appraisals and coal deposits, Exhibits H and I, had not used or attempted to use or apply these materials in the contested assessments.

The record does not disclose that the assessor ever, in making assessments at issue before this Court made use of any materials, guides, services or assistance available through the State Tax Commissioner's Office.

The evidence before the undersigned discloses that in 1975 the assessment of the real estate now owned by petitioner, totaling 7,306 acres, was $488,990.58.

After the property was conveyed to the petitioner, Allegheny Pittsburgh, during the autumn of 1974, the assessment of this real estate, on a purchase price of $24,624,500.00 rose to $12,312,250.00 in 1976.

Following the conveyance of this real estate by the petitioner, Allegheny Pittsburgh, to the petitioner, East Kentucky, on July 15, 1982, for a declared consideration of $29,842,500.00, the assessment was increased to $14,921,250.00, in 1984.

A comparison of the assessment history of the Exhibit B properties for the same period reveals that this real estate, a total of 8,398.9 acres, was assessed in 1975, at $229,961.88. In 1976, the total assessment was increased to $404,407.03, and in 1982 to the sum of $522,030.00.

The assessment for Exhibit G comparables, a total of 9,767.76 acres was $277,520.00 in 1975. The assessment of this property was increased to $519,644.83, in 1982, and in 1984, to $569,594.00.

A comparison of the Exhibit C, petitioners, and Exhibit B assessments for 1975 discloses that the Exhibit C assessment was $259,028.70 greater than the Exhibit B assessment. This difference increased to $11,907,843.00, in 1976, and in 1984, to $14,399,220.00.

The Exhibit C assessment was $211,470.58 greater than the Exhibit G assessment in 1975. The difference increased to $11,792,606.00 in 1976 and to $14,351,656.00 in 1984.

These differences in assessment have been protested, first by the petitioner, Allegheny Pittsburgh, and now by the petitioners, East Kentucky, since 1976, and are alleged by the petitioners to be violative of the "equal and uniform" provision of West Virginia Constitution Article X, Section 1.

DISCUSSION

Article X, Section 1, of the West Virginia Constitution, titled *Taxation and Finance* provides, in part, that ". . . taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law."

Article X, Section 1, further provides, in part, that "[n]o one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value . . .".

The West Virginia Supreme Court of Appeals in a case styled, Killen v. Logan County Com'n., W.Va., 295 S.E. 2d 689, at Page 693, characterized Article X as being ". . . both a grant of power to the Legislature to tax . . ." by virtue of the provisions of West Virginia Constitution Article 10, §§1, 5, and 9, ". . . and a limitation upon that power."

The limitation according to the Court lies in the requirement that the taxation contemplated be "equal and uniform" and in the concept and provision that taxation should be equal on properties of equal value.

Article X, Section 1, according to our Court contemplates the establishment of a system of property taxation in which property, "both real and personal" is subjected to "equal and uniform" taxation, as "directed by law".

The matter of "equal and uniform" property taxation has been addressed by the Legislature through the enactment of various statutes for the implementation of the process of taxation. This process contemplates a statewide system of taxation in which the tax is to be equally and uniformly applied in proportion to the value of the property taxed.

The Supreme Court in Killen v. Logan County Com'n., *supra*, described the process of taxation as consisting of the elements of valuation and levying. Valuation is described as the act of assigning a value to each property to be taxed. Once the value is assigned to a particular property a tax, at a designated rate, is levied, or charged, against the property.

The responsibility or valuation, assigning or placing the value at which property is to be taxed, is that of the county assessor. This aspect of the process of taxation is known as assessment and is the aspect of the process of taxation at issue before this Court.

Once the county assessor establishes a value for a property, assesses it, for taxation, various levying bodies, including the State, the county commissions, local school boards and municipalities determine the rate, or amount, of tax to be levied or collected for each one hundred dollars value assessed. This aspect of the taxation process, known as levying, is not at issue before this Court.

W.Va. Code, § 11-3-1, provides that "[a]ll property shall be assessed (by the assessor) annually as of the first day of July at its true and actual value; that is to say, at the price for which such property would sell if voluntarily offered for sale as such property, the value of which is sought to be ascertain, is usually sold, and not the price which might be realized if such property were sold at a forced sale . . .".

Though our Supreme Court in Kemp v. Boyd, W.Va., 275 S.E.2d at 303, recognized that the primary responsibility for the execution of the duty of assessing county property for taxes, ". . . a task requiring foresight, cooperation and detailed labor . . .", rests upon the county assessors and commissioners, the Court, in Tug Valley Recovery Center, Inc. v. Mingo Cty. Comm., W.Va., 261 S.E.2d 165, at page 173, in noting the technical and complex nature of the assessment of real estate values, particularly mineral estates, concluded that the task of assessment was ". . . lightened to a great extent by the provisions of W.Va. Code § 18-9A-11 . . ." which ". . . provides that the State Tax Commissioner is to make an appraisal of all mineral and surface estates in West Virginia, and *that appraisal is to serve as the basis for determining true and actual value for all assessment purposes.*"

The Court in stating that ". . . once the Tax Commissioner's appraisal has been made . . . it is incumbent upon the circuit court, (upon an appeal) as it would be upon the county commission and the assessor, to set the assessed value of all parcels of land at the amount estab-

lished by the State Tax Commissioner.", appears to have attached a substantial significance to the Tax Commissioner's appraisal.

It would seem that the former assessor, who during her testimony acknowledged receipt of the Tax Commissioner's appraisal of Webster County coal properties, obviously did not attach the same significance, in view of the fact that after receipt of the appraisal it was placed in a drawer where it remained unused and abandoned until the day of the hearing. The present occupant of the office seems to have adopted substantially the same position as that of his predecessor.

The responsibility of the Tax Commissioner to provide executive oversight for the assessor, by furnishing property appraisals and correcting incorrect assessments as provided in W.Va. Code § 18-9A-11, was emphasized in Killen v. Logan County Com'n., *supra*, at page 694, and again in a case syled In Re: Tax Assess. Against Pocahontas Land Co., 303 S.E.2d 691 (W.Va. 1983), at page 699. Our Court in Killen, at page 694, stated that "[t]he state tax commissioner has the duty of supervising all of the valuation process. W.Va. Code § 11-1-2; W.Va. Code § 18-9A-11."

Though the interrelation between the duties of an assessor and those of the Tax Commissioner is apparent from an examination of appropriate statutory provisions and cases decided by our Court with reference thereto, the functions of the two offices in the valuation process are different.

In the process of valuation one of the duties of the Tax Commisioner is that of *appraisal*, while that of the assessor is that of *assessment*. In footnote 5, at pages 694 and 695, our Court, in the Killen case *supra*, defined an appraisal as generally meaning ". . . the estimate of value given a particular item or piece of property." An assessment was described as meaning ". . . the listing

and valuation of property for taxation purposes." Both appraisals and ". . . assessments are to be based on true and actual value. W.Va. Code § 11-3-1."

Although the undersigned found no statute or case specifically so stating, it seems, from the statutes and cases examined, that the process of appraisal and assessment contemplated by the Legislature is one in which the State Tax Commissioner has been vested with a general responsibility for the establishment of property values, statewide. The statutes and cases also suggest that the assessor's duty is that of affirmatively examining and assessing each piece of property, equally and uniformly, within his county. If the process works it would seem that property appraisals and assessments, within county borders and statewide would be uniform.

Logic indicates that although the Tax Commissioner may be aware, in general, of the value of machinery, equipment, motor vehicles, boats, dwellings, buildings, land and other property, both from county to county and statewide, it does not follow the Commissioner, with or without the help of his deputies, would be aware of the condition of all the machinery, equipment, motor vehicles, boats, dwellings, buildings and land, any more than he would be aware of the specific characteristics of a particular parcel of land in Webster County.

Though the Tax Commissioner might have general knowledge of the value of Webster County land, without the benefit of examination the Commissioner would not be aware of whether any given tract was level or precipitous, timbered, farmed or waste land, mined or unmined, accessible or inaccessible or any number of things that could add to, or detract from, the value of the land.

It seems that in vesting the assessor's office with the power to assess the Legislature contemplated an assessment process in which the assessor and his deputies, they being county residents, would go into the county and view

the machinery, equipment, motor vehicles, boats, dwellings, buildings, land and other property to be assessed and make a reasoned and rational determination as to value for purposes of assessment. Our Court in Tug Valley Recovery Center, Inc. v. Mingo Cty. Comm. W.Va., 261 S.E.2d 165, at page 173, described "[t]he assessment of real estate value . . ." as ". . . a very technical and complex area . . ." and in Kemp v. Boyd, *supra*, described " . . . the mission of assessing county property for taxes as a task requiring foresight, cooperation and detailed labor."

In a case styled Michael Kline, et al. v. Jim McCloud, et al., 326 S.E.2d 715 (W.Va. 1984), at page 718 of the decision, our Court stated that "[i]n determining the fair market value of a piece of land, a county assessor must 'seek out all information which would enable him to properly fulfill his legal obligation.' *In Re* Shonk Land Co., 157 W.Va. 757, 761, 204 S.E.2d 68, 70 (1974)." In the case at bar it appears from the evidence that the assessment was based solely on the consideration declared in petitioners' deeds. The assessor gave no weight or consideration to the appraisals of the Tax Commissioner, engineering reports presented on behalf of the petitioners, or the appraisals submitted. Instead of seeking out information the assessor seems to have totally refused to consider evidence submitted on behalf of the petitioners.

However, though recognizing the supervisory authority of the Tax Commissioner in the process of property taxation, our Court appears to hold that an assessor, in performing the function of property assessment, is not obliged to simply parrot the appraisals of the Commissioner.

The first step in taxing real property is a determination of "true and actual" value. Kline v. McCloud, *supra*, at page 718. In the Kline case the Court reaffirmed that true and actual value meant fair market value, the selling price on the open market. Quoting In

Re Shonk Land Co., 157 W.Va. 757, at 761, 204 S.E.2d 68, at 70, our Court in Kline, at page 718, stated that: "although the assessor is under the supervision of the state tax commissioner he is not restricted in the search for information leading to the true and actual value of properties to questions formulated by that state official."

The Court thereafter again affirmed its holding in Killen that county assessors were entitled to consult other credible and reliable sources, including the owner's sworn valuation and bona fide appraisals, as a part of the process of assessment, and were not limited to merely following the appraisals of the State Tax Commissioner.

Finally, the Court, citing Crouch v. County Court of Wyoming County, 116 W.Va. 476, 477, 181 S.E. 819 (1935), ". . . recognized that the price paid for real estate . . ." is ". . . a substantial indicia of its true and actual value, so long as the property changed hands in an arm's length transaction . . ." and that although the purchase price paid was not conclusive on the issue of value it is a factor to be considered in an arms length transaction.

From the foregoing it is evident that the assessor of Webster County, in 1976, when the assessment of the petitioner, Allegheny Pittsburgh, was increased, and thereafter, had several courses of action available in the matter of the questioned assessments.

The assessor had the option of basing the assessment, as has been proposed by petitioners, upon the Tax Commissioner's appraisals of Webster County real estate. At that time, 1976, the 1969 appraisal was available, and possibly the appraisal for 1975. The assessor did not use or consider the appraisals available through the Tax Commissioner's office.

In addition, the assessor had the option of assessing the subject real estate at a rate consistent with the as-

sessment of substantially similar adjacent and contiguous properties. This option was likewise rejected.

The assessor at that time and thereafter, could also have assessed the subject property based on a number of factors including the declared consideration, the Tax Commissioner's appraisals, the assessed value of substantially similar real estate, appraisals presented by or secured from private appraisers, the nature, use, access and development of the property together with other factors causing or tending to cause the subject property to be worth more, or less than comparable real estate. This option was likewise rejected by the assessor.

Finally, the assessor had the option, at that time, of assessing petitioner, Allegheny Pittsburgh's, real estate at fifty percent of the consideration declared in the deed. At that juncture the assessment could have been properly made and sustained under the theory that in determining "true and actual" value, for purposes of assessment, the value declared in an arms length transaction substantially indicates the true and actual value of the property conveyed.

At that point, the assessor would have been entitled to the benefit of the general presumption that the valuation was correct, Bankers Pocahontas Coal Company v. County Court of McDowell County, 135 W.Va. 174, 179, 62 S.E.2d 801, 804 (1950), thereby casting upon the taxpayer, the petitioner, the burden of showing by clear and convincing evidence that the assessment was erroneous. In Re: Tax Assessment Against the National Bank of West Virginia at Wheeling, et al., 137 W.Va. 673, 687, 73 S.E.2d 655, 664 (1952), In Re Assessment of Kanawha Valley Bank, 144 W.Va. 646, 109 S.E.2d 649 (1959), In Re Tax Assess. Against Pocahontas Land Co., 303 S.E.2d 691, 699 (W.Va. 1983). Although the 1976 assessment, as is shown by the evidence, exceeded the assessment of substantially similar property, the deviation, at that time could have been upheld as a spo-

radic deviation. However, if an assessor undertakes to base current real estate assessments on the value declared in recent arms length real estate transactions, he must likewise raise the assessment of similar real estate to a like level, whether or not the similar real estate has been recently conveyed.

Though the 1976 assessment of Allegheny Pittsburgh's real estate may have been presumptively correct, at that time, by failing to equalize assessments, that is, to either raise the assessment of comparable properties to a level comparable to petitioners' assessment, or to lower petitioners' assessment to a level comparable that at which substantially similar real estate was being assessed, the assessor failed to achieve equality and uniformity in taxation, as required by Article X, Section 1. Ample opportunity existed between 1976 and 1985 to correct inequality of assessment reflected in Exhibits B, C and G.

Our Court, in Killen v. Logan County Comm'n., *supra*, at page 701, citing R. Blakey, *Report on Taxation in West Virginia* 107 (1930), noted that

> "The success of the general property tax depends upon the quality of the assessments. If assessments are very unequal the foundation of the entire tax structure is unsound. Inequality of assessments means that *those underassessed pay less than their fair share of public expenses* and *those overassessed pay their full share and, in addition, they have to make up for what the underassessed fail to pay.* The greater the inequalities of assessment the greater the inequalities of the taxes and the more grevious the burdens upon those who find it most difficult to meet their obligations. (Emphasis supplied).

In a case decided in 1980, styled, Matter of U. S. Steel Corp., W.Va., 268 S.E.2d 128, at page 132, our Court held that "[w]hile it is true that unintentional, sporadic deviations from an established system are not a sufficient

basis for reversal of an assessment . . . [i]t would be totally unacceptable to allow counties to use two systems of assessment, one for favored taxpayers and one for other." Although the facts in the U. S. Steel case are not identical to those in the case at bar, the principle set forth therein is applicable here.

Though the issue confronting this Court, the assessor, the County Commission and Board of Education of Webster County, has been portrayed in some newspapers as an issue involving the wrongful, and unjustified, refusal of a foreign corporation to pay lawfully assessed and levied taxes, such is not the cases.

The reluctance of the assessor and a Board of Equalization and Review to increase the real estate assessments, and consequently the real estate taxes, of friends and neighbors to a level comparable to the assessment and levy returned against the petitioners, East Kentucky and Allegheny Pittsburgh is understandable. So too is a refusal to lower the assessment of a foreign corporation, especially if to do so has been publicly represented as subjecting the county government and the school system to bankruptcy.

Despite the outcry, however, the evidence presented clearly and convincingly establishes that the assessor, and the Board of Equalization and Review, in sustaining the questioned assessments, have, over a period of ten years, systematically and intentionally assessed the petitioners' real estate, and consequently levied taxes against petitioners' real estate, at a weighted rate per acre of from 5,672.56 to 6,511.06 percent in excess of the weighted rate per acre assessment applied to comparable real estate owned by others and located adjacent, contiguous or near that of the petitioners.

The evidence further shows, and the Court so finds, that the inequality of the assessment of petitioners' real estate and that of comparable tracts has been repeatedly

brought to the attention of the assessor and the Board of Equalization and Review over the ten year period involved.

The evidence also demonstrates, and the Court finds, that as petitioners have repeatedly and consistently protested the inequality of the assessment of their real estate, as compared to the assessments of comparable real estate owned by others, the assessor and Board of Equalization and Review, have just as consistently and repeatedly refused to equalize petitioners assessment downward or to equalize the real estate assessments of others upward, though petitioners' have requested relief in both directions.

Additionally, the evidence discloses, and the Court finds, that the assessor and Board of Equalization and Review have repeatedly refused to consider or give any weight or credence to the evidence tendered by petitioners in their prayer for equal and uniform assessment.

Our Court in the Pocahontas Land Co. case, 303 S.E. 2d 691, at page 699, (W.Va. 1983), held that ". . . where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous. Once this is done, *it is incumbent upon the taxing authority to place some evidence in the record to show why its assessment is correct.*" (Emphasis supplied).

In the matter before this Court, though the petitioners have demonstrated by clear and convincing evidence that the assessment is erroneous, the taxing authority has not only failed to place evidence in the record to establish the correctness of the assessment, but has totally failed to consider the evidence tendered by the petitioners.

It would seem from a reading of Kline v. McCloud, 326 S.E.2d 715, 719 (W.Va. 1984), that even though an assessor may ". . . supplement the Tax Commissioner's appraisal report with information obtained from property

owners or from recent deed values to determine the value of property without violating the equal and uniform provisions of our State Constitution . . .", if the taxpayer can demonstrate that the real estate of others has been systematically and intentionally undervalued, the taxpayer is entitled to relief under the equal protection clause of the Fourteenth Amendment to the United States Constitution and under the equal and uniform clause of Section 1, Article X of the West Virginia Constitution. Kline v. McCloud, *supra*, at page 724.

It is further held in *Kline*, at page 724, ". . . that the price paid for property in an arm's length transaction, while not conclusive, is relevant evidence of its true and actual value." It seems to be obvious, therefore, that although an assessor is at liberty to base real estate assessments upon values or consideration declared in recent conveyances, if the assessor elects to use recent sales as the basis for the assessment of real estate, he is obligated by the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal and uniform clause of Section 1, Article X, of the West Virginia Constitution to base the real estate assesssments of substantially similar real estate, whether owned by a corporation or an individual, upon the same or a similar value, depending on certain variables, even though the real estate has not been the subject of a recent conveyance.

The evidence clearly demonstrates, and this Court finds, that though the assessor and Board of Equalization and Review were lawfully entitled to consider the consideration declared in petitioners' deeds, in determining their respective assessments, by intentionally and systematically, failing to either equalize assessments by increasing the assessed value of substantially similar property to the level of petitioners' assessments, or to equalize assessments by lowering petitioners' assessments to the level at which comparable real estate was being as-

sessed, the assessor and Board of Equalization and Review violated the equal and uniform clause of Section 1, Article X of the West Virginia Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

From the evidence presented, this Court finds that the assessments complained of by petitioners were incorrect. In this circumstance, pursuant to the provisions of West Virginia Code § 11-3-25, the Circuit Court is obligated to "correct the assessment, and fix the property at its true and actual value." Tug Valley Recovery Center, Inc. v. Mingo County Commission, W.Va., 261 S.E.2d 165, 171; Killen v. Logan County Commission, W.Va., 295 S.E.2d 689, 706.

Though our Court, at page 172 of the Tug Valley Recovery Center, Inc. v. Mingo County Commission, decision declined, in view of the full taxation mandates of West Virginia Code § 11-3-1 and § 18-9A-1, to reduce the petitioner's assessment and instead directed an increase in the assessment of the taxpayers who were undervalued, this Court is of the opinion that a reduction of the petitioner's assessment, in this instance, is proper for several reasons.

First, as our Court noted in the Killen decision, at page 703, "[t]he United States Supreme Court . . . [i]n Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923) . . . ruled that where uniformity of taxation and full value assessment could not be reconciled, uniformity took precedence."

In the present matter, though this Court is of the opinion that authority exists to order the assessor to equalize assessments by increasing the assessment of comparable properties to the level at which petitioners' property is assessed, the undersigned is further of the opinion that the consideration declared in an arms length transfer of real estate, though relevant as to value, should not

necessarily serve as the basis for the assessment of all similar real estate.

Though petitioners' deeds reflect declared considerations of 24,624,000.00 and 29,842,500.00 in 1974 and 1982, and though the real estate may in fact have been worth the consideration declared, the differing abilities of various real estate owners to bear the burden of real estate taxes based upon prices paid by the wealthy leads the undersigned to conclude that the consideration declared in petitioners' deeds should not, in this case, serve as the basis for the assessment of all substantially similar real estate in Webster County.

The impact of high real estate taxes will obviously be greater upon one of modest income than it will on an individual or corporation possessed of wealth sufficient to purchase real estate at a premium price and in a position to take advantage of various tax write offs available under present tax laws.

The consequence of a high real estate assessment, and tax, will materially vary depending on whether the taxpayer is one of limited or fixed income or is a public utility company, entitled to write off, and to pass on to consumers, the cost of real estate taxes levied. Should uniformity of taxation be attempted through an increase of the assessment of Webster County real estate to the level of that of the petitioners, an assessment in excess of $2,000.00 per acre, it seems probable that individual ownership of real estate of the nature owned by the petitioners would shortly disappear except for those of great wealth.

Second, from a reading of W.Va. Code § 11-3-25, relating to relief in the Circuit Court against an erroneous assessment, it appears that a Circuit Court, in hearing an appeal as contemplated in § 11-3-25, is empowered to fix the true and actual value of property erroneously assessed and to order the refund of excess taxes paid, the

probable basis for the public clamor in this matter, if the property was valued too high, and if valued too low, to correct the valuation and fix its true and actual value.

From the foregoing, it is obvious that a Circuit Court is vested with authority to increase or decrease values in the process of correcting erroneous assessments, as an assessor and a Board of Equalization and Review is vested with authority to increase or decrease assessments to secure equal and uniform property taxation.

Therefore, though our Court appeared to discourage a reduction in valuation to secure equal and uniform taxation, in the Tug Valley Recovery case, *supra*, page 172, it is evident from the provisions of W.Va. Code § 11-3-25, and the utilization of this approach by our Court in a series of its decisions: In Re United States Steel Corp., W.Va. 268 S.E.2d 128 (1980); In Re Tax Assessment Against Pocahontas Land Corp., W.Va. 210 S.E.2d 641 (1976); In Re Assessment of Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649 (1959), that where a reduction in the value of property erroneously assessed is necessary to insure uniformity Circuit Courts are empowered to reduce the values of properties erroneously assessed.

Finally, our Court has emphasized the need to assure uniform property assessment by, among other things, the implementation of appropriate provisions of W.Va. Code § 18-9A-11. At page 705 of Killen v. Logan County Commission case *supra* our Court, in emphasizing the need to make use of the Tax Commissioner's appraisals, stated that "W.Va. Code § 18-9A-11 provides that the county officials *shall use such appraised valuations as a basis for determining the true and actual value for assessment purposes. . . .* This Court adheres to the view that *'the use of the word shall without any modification unquestionably makes the direction mandatory.'* "

As has been previously noted, W.Va. Code § 11-3-25 provides that in instances of erroneous assessment the

Circuit Court is to "correct the assessment, and fix the property at its true and actual value". In performing this function, our Court, in Tug Valley Recovery Center, Inc. v. Mingo County Commission, 261 S.E.2d 165, at 173, and in Killen v. Logan County Commission, W.Va., 295 S.E.2d 689, at 705, stated that "[*i*]*t is incumbent upon the circuit court, as it would be upon the county commission and the assessor, to set the assessed value of all parcels of land at the amount established by the State Tax Commissioner.*"

Consistent with our Courts' directive and in consideration of the evidence adduced, including Exhibit I, the Tax Commissioner's Guide of Assessors Valuation of Coal Appraisals, indicating an appraised value for Webster County coal of $360.00 per acre, during the period involved, a reduction in valuation is required.

It is therefore, pursuant to the provisions of W.Va. Code § 11-3-25, the judgment and order of this Court and this Court finds and fixes the true and actual value of petitioners' parcels 4Q-16, 4P-1, 4Q-15, 3Q-5, 3Q-9, 3P-15, a 100 acre parcel of Coal and a 100 acre mineral parcel, both situate on Beaver Creek, be at $360.00 per acre.

It is the further JUDGMENT and ORDER of the Court that the assessment of parcels 4R-67, 4Q-6, 4Q-7, 4Q-71-1 and 45-91 for a period in question be and the same is hereby affirmed, it being the finding of this Court that from, the small size of said parcels, the imposition of comparable assessments to comparable properties of others and a lack of evidence establishing that the assessments were not uniform as to these parcels, that petitioners have not shown these assessments to be erroneous.

It is the further JUDGMENT and ORDER of this Court and this Court finds and fixes the true and actual value of petitioners' parcels 4Q-15, 3P-14, 3P-12, 3P-11 and 3P-13 at $300.00 per acre.

It is the further JUDGMENT and ORDER of this Court that the assessor recompute petitioners assessed valuations in a manner consistent with true and actual values herein before found and fixed by this Court, at sixty percent thereof, and that the assessor forthwith issue new tax tickets to petitioners applying the correct levy rate to the corrected valuations and assessments.

Inasmuch as the petitioners have not paid tax for the years 1983, and 1984 it is the further JUDGMENT and ORDER of this Court that said petitioners should be and they are hereby released from the payment of taxes assessed and levied upon the valuations and assessments hereinbefore found to have been erroneous.

It is the further JUDGMENT and ORDER of this Court that the Assessor of Webster County, Dana Lynch, consistent with his duty to comply with Section 1, Article X of the West Virginia Constitution requiring equal and uniform taxation, immediately contact the office of the State Tax Commissioner of West Virginia and schedule a meeting with said Tax Commissioner, or such deputy or representative as said Tax Commissioner shall designate, for the purpose of evaluating and reviewing current real estate assessments in Webster County, West Virginia; determining whether said assessments are being made in violation of the equal and uniform provisions of Article X, Section 1; whether said assessments are generally equal and uniform throughout the county, and if not a description of actions needful and necessary to secure equal and uniform taxation; whether the assessor is effectively utilizing the technology, materials and assistance available through said Commissioner's office, and that said assessor do appear before the undersigned, at the Webster County Courthouse, Webster Springs, West Virginia, in the Courtroom therein, at one o'clock p.m., on January 17, 1986, and then and there report to this Court in writing and verbally the result of the evaluations, review and determinations herein ordered.

ENTERED THIS THE 22ND DAY OF NOVEMBER, 1985.

/s/ Danny O. Cline
DANNY O. CLINE
Judge

APPENDIX E

IN THE CIRCUIT COURT OF WEBSTER COUNTY
WEST VIRGINIA

Civil Action No. 81-C-42

IN RE: SHAMROCK COAL COMPANY, INC., a corporation

Civil Action No. 82-M-18

IN RE: ONEIDA COAL COMPANY, INC., a corporation

Civil Action No. 83-MSC-10

IN RE: ONEIDA COAL COMPANY, INC., a corporation

Civil Action No. 84-MSC-10

IN RE: ONEIDA COAL COMPANY, INC., a corporation

Civil Action No. 85-MSC-19

IN RE: ONEIDA COAL COMPANY, INC., a corporation

[Filed Feb. 13, 1986]

ORDER

On the 31st day of January, 1986, the above-styled actions having been consolidated by orders heretofore entered herein, came on to be heard, the Petitioners (Shamrock Coal Company, Inc., a corporation, and Oneida Coal Company, Inc., a corporation) appearing by W. T. Weber, Jr., their attorney of record, and the Respondent, the Webster County Commission, appearing by Jack Alsop, Prosecuting Attorney for Webster County, West Virginia, upon the petitions for review and equalization of assessment of properties of Petitioners in Webster County, West Virginia, filed with the Webster County Commission in

1981, 1982, 1983, 1984 and 1985, the original records in each of the proceedings before the Webster County Commission, including transcripts of the testimony taken and certified as required by law, all Exhibits filed in each of said proceedings, all orders of the Webster County Commission denying Petitioners relief and memoranda of the parties heretofore filed, all constituting and being the complete and full record of all proceedings before the Webster County Commission; Petitioners' petitions for appeal and relief from assessment heretofore filed in this Court, orders granting the appeals and consolidation of these actions, and argument of counsel.

Petitioners have been at all times relevant herein the owners of three thousand seven hundred (3,700) acres of coal in Glade District and four thousand eighty three (4,083) acres of coal in Holly District, Webster County, West Virginia, in the aggregate seven thousand seven hundred eighty three (7,783) acres.

Although the real estate (coal property) of Petitioners is not identical to that of all other real estate (coal property) in Webster County, it appears that Petitioners' real estate is substantially similar to the real estate of the others in topography, location, access, development and mineral content and that the Petitioners' real estate is substantially similar to adjacent and contiguous tracts and parcels of real estate owned by others.

The Petitioners, individually and collectively, contend that their real estate (coal property) has been systematically valued, assessed and taxed in violation of the "equal and uniform" requirement of Article X, Section 1 of the Constitution of West Virginia. They further maintain that, though the real estate owned by them is substantially the same as adjacent and contiguous real estate (coal property) owned by others, the Assessor and the Webster County Commission sitting as a Board of Equalization and Review, by sustaining the assessment of Petitioners' real estate (coal property), have systematically

valued, assessed and taxed Petitioners' real estate (coal property) at a rate well in excess of the rate applied to adjacent and contiguous owners.

The Petitioners assert that the rate of their respective valuations and assessments not only exceeds the rate of assessment applied to the real estate (coal property) of adjoining and contiguous owners, but is also valued at more than double the per acre value established by the 1975 appraisement of the State Tax Commissioner of West Virginia for substantially similar Webster County coal property. They further maintain that while their coal property is valued, and consequently assessed and taxed, at a per acre rate approximately twice that of the Tax Commissioner's 1975 appraisement for similar Webster County coal property, substantially similar parcels of adjacent and contiguous coal property owned by others is valued, assessed and taxed at a per acre rate considerably less than that applied to the Petitioners and in fact less than the per acre rate for similar Webster County coal property by application of the Tax Commissioner's 1969 guide for the valuation and appraisal of coal properties.

Finally, the Petitioners assert that the Assessor, over a period of five years, has systematically valued, assessed and taxed Petitioners' coal property at an excessive rate while refusing to increase to a like rate the assessment of substantially similar coal property lying adjacent and contiguous to that of Petitioners, but owned by others, or to decrease to a like value Petitioners coal property.

The respondents contend that Petitioners' real estate is properly valued, assessed and taxed.

Upon consideration of the entire record adduced before the Webster County Commission sitting as a Board of Equalization and Review, including the transcribed testimony and Exhibits admitted in evidence, the Court finds as matters of fact:

FINDINGS OF FACT

(1) That Shamrock Coal Company, Inc., (Shamrock) and Oneida Coal Company, Inc., (Oneida) Petitioners, are each wholly owned subsidiaries of Elk River Resources, Inc., a corporation, and that the interest herein of Petitioners is identical, except that the legal title to the property, the subject of these consolidated actions, was vested in Shamrock at all times relevant to Civil Action No. 81-C-42, and at all other times the legal title was vested in Oneida.

(2) Petitioners at all times relevant herein, are the owners of three thousand seven hundred (3,700) acres of coal in Glade District and four thousand eighty three (4,083) acres of coal in Holly District, Webster County, West Virginia, in the aggregate seven thousand seven hundred eighty three (7,783) acres of coal. The real estate or real property of Petitioners' is hereinafter referred to as "coal property".

(3) The coal property is the same conveyed to Oneida by Shamrock, by deed dated May 12, 1981, of record in the office of the Clerk of the County Commission of Webster County, West Virginia, in Deed Book No. 191, at page 265, and the same heretofore conveyed to Shamrock by Preston W. Carroll, and wife, by deed dated December 21, 1977, of record in said Clerk's office in Deed Book No. 180, at page 387. Oneida is the successor corporation in title to Shamrock. The conveyance of the coal property to Oneida by Shamrock was a transfer between subsidiary corporations of Elk River Resources, Inc., and without actual paid cash consideration.

(4) Shamrock acquired the coal property, together with other properties situate in Braxton and Nicholas Counties, West Virginia, by the deed aforesaid to it from Preston W. Carroll, and wife, and paid therefor the sum of Ten Million Dollars ($10,000,000.00) for all of the property in Webster, Nicholas and Braxton Counties.

The deed conveyed to Shamrock 1,500 acres, more or less, sometimes referred to as 1,646 acres or 2,300 acres, of coal property in Nicholas County, West Virginia, 7,783 acres of coal property in Webster County, West Virginia, and 3,955 acres of coal property in Braxton County, West Virginia, an aggregate of 13,238 acres or 14,038 acres. The deed declares that the total consideration paid for the property conveyed as aforesaid to Shamrock is Ten Million Dollars ($10,000,000.00). In addition to the property conveyed by the deed aforesaid to Shamrock for the consideration noted above, Preston W. Carroll and wife, assigned to Shamrock a coal lease made by H. Rembrant Woolridge, and others, to Preston W. Carroll for 183.5 acres of coal, including 146.5 acres of surface over lying part of the 183.5 acres of coal, a lease from H. R. Deitz, and others, to Preston W. Carroll, for 100 acres of coal in Webster County, West Virginia, and an option by and between Cathryn Randolph and Byron B. Randolph, her husband, to Preston W. Carroll, to lease 1,693.28 acres of coal in Webster County, West Virginia.

(5) The Assessor of Webster County appraised Petitioners' coal property by taking a percentage of the declared consideration of Ten Million Dollars ($10,000,000.00) equal to the total number of acres included in the conveyance aforesaid from Preston W. Carroll in Webster County, West Virginia, to the total number of acres contained in the conveyance in Webster, Braxton and Nicholas Counties, West Virginia, without consideration of the value of the leases and options assigned.

(6) The Assessor of Webster County, West Virginia, has appraised Petitioners' coal property at Five Million Eight Hundred Sixty Seven Thousand Six Dollars ($5,867,600.00).

(7) The Assessor has assessed Petitioners' coal property upon the appraised value established by the Assessor

as aforesaid by assessing Petitioners' coal property at 50% of the appraised value, an assessed value of Two Million Nine Hundred Thirty Three Thousand Eight Hundred Dollars ($2,933,800.00).

(8) The appraised value of Petitioners' coal property in Webster County, West Virginia, is $753.90 per acre.

(9) The assessed value of Petitioners' coal property in Webster County, West Virginia, is $376.95 per acre.

(10) The Tax Commissioner of West Virginia has appraised coal property in Webster County, West Virginia, at $360.00 per acre.

(11) The assessed value of Petitioners' coal property in Webster County, West Virginia at $376.95 per acre is $160.95 per acre more than 60% of the appraised value of $360.00 per acre established by the Tax Commissioner ($360.00 x .60 = $216.00; $376.95 — $216.00 = $160.95) and $196.95 per acre more than 50% of the appraised value of $360.00 per acre established by the Tax Commissioner ($360.00 x .50 = $180.00; $376.95 — $180.00 = $196.95).

(12) The Assessor has not had Petitioners' coal property appraised.

(13) The Assessor has no qualifications or expertise to appraise coal properties.

(14) The Assessor has not inspected or viewed Petitioners' coal property.

(15) The Assessor has ignored the value placed upon Petitioners' coal property by the Tax Commissioner of West Virginia.

(16) The Assessor has ignored geological information, engineering information and a bona fide appraisal presented to her and to the County Commissioner of Webster County in the years 1981, 1982, 1983, 1984 and 1985 in appraising and assessing Petitioners' coal property.

(17) That the Land Books for the year 1983 for Holly, Hacker Valley, Glade and Fork Lick Districts of Webster County, being all of the Magisterial Districts in Webster County except for those districts including only municipal corporations, there were 1,092 tracts assessed as coal tracts only; that there were 101 coal tracts, or 9% of the coal tracts, assessed in excess of $180.00 per acre, and 991 or 91% of the coal tracts assessed at less than $179.00 per acre.

(18) For the year 1983 84% of all coal tracts in Webster County were assessed at or below $50.00 per acre.

(19) For the year 1983 the average assessed value in Holly District of coal only tracts is $107.00 per acre.

(20) That the Land Books for the year 1984 for Holly, Hacker Valley, Glade and Fork Lick Districts of Webster County, being all of the Magisterial Districts in Webster County except for those districts including only municipal corporations, there were 1,141 tracts assessed as coal tracts only; that there were 109 coal tracts, or 10% of the coal tracts, assessed in excess of $180.00 per acre, and 1031 or 90% of the coal tracts assessed at less than $179.00 per acre.

(21) That for the year 1984 82% of all coal tracts in Webster County were assessed at or below $80.00 per acre.

(22) That the Land Books for the year 1985 for Holly, Hacker Valley, Glade and Fork Lick Districts of Webster County, being all of the Magisterial Districts in Webster County except for those districts including only municipal corporations, there were 1,155 tracts assessed as coal tracts only; that there were 114 coal tracts, or 10% of the coal tracts, assessed in excess of $180.00 per acre, and 1041 or 90% of the coal tracts assessed at less than $179.00 per acre.

(23) That for the year 1985 86% of all coal tracts in Webster County are assessed at or below $80.00 per acre.

(24) The Webster County Land Books show *changes* in assessed values, assigned by the Assessor, for coal only tracts from 1983 to 1984 as follows:

Assessed Value	Number of Tracts	Percent
10% increase	55	5%
9%-11% increase	299	27%
Less than 9% increase	203	18%
11%-20% increase	72	6%
More than 20% increase	87	8%
Entries unchanged	392	35%
Entries reduced	7	1%

One third (1/3) of coal only entries fall beyond 10% increase, plus or minus one, from 1983 to 1984; 392 entries or 35% of all tracts were not changed; 354 or 32% of all entries were increased between 9% and 11%; and 362 entries or 33% increased less than 9% or more than 11%.

One hundred eighty four (184) entries were increased a flat $10.00 per entry from 1983 to 1984.

(25) The Assessor has systematically and intentionally undervalued similar coal properties in Webster County and the systematic and intentional undervaluation has been ratified and confirmed by the Webster County Commission sitting as a Board of Equalization and Review.

(26) Petitioners' coal property containing in the aggregate 7,783 acres contains only 2,510 acres of mineable coal.

(27) Steven A. Holmes, a qualified coal appraiser, has appraised Petitioners' coal property and assigned a total value of Nine Hundred Twenty Six Thousand, One Hundred Seventy Seven Dollars ($926,177.00).

(28) Petitioners' have presented the testimony of a geologist, engineers, a qualified appraiser, the coal appraisal summary of the Tax Commissioner and an analysis of the assessed valuation of coal properties in Webster County, West Virginia, all of which have been ignored by

the Assessor and the Webster County Commission. The Assessor and Webster County Commission have presented no evidence in support of the appraised and assessed values assigned to Petitioners' coal properties for purposes of *ad valorem* taxation.

(29) The Webster County Commission by denying Petitioners the relief prayed for has adopted, ratified and confirmed the actions, conclusions, appraisal and assessments of the Assessor.

(30) Petitioners timely applied to the County Commission of Webster County, West Virginia, sitting as a Board of Equalization and Review, (Commission) in the years 1981, 1982, 1983, 1984 and 1985 to adjust and equalize the assessment of Petitioners' coal lands in Webster County, West Virginia.

(31) The Commission refused to grant the relief sought by Petitioners and to equalize and adjust the assessment of Petitioners' coal lands for the purposes of *ad valorem* taxation in Webster County, West Virginia, by its orders timely entered in 1981, 1982, 1983, 1984 and 1985.

(32) Petitioners timely filed for appeal in this Court pursuant to *West Virginia Code* § 11-3-25 in 1981, 1982, 1983, 1984 and 1985 and the appeals were granted in each of said years.

(33) The transcripts of testimony, adduced in the various hearings before the Board of Equalization and Review, reveal that, though the Assessor was aware that Petitioners' real estate was being assessed at a rate substantially greater than the assessment applied to similar real estate owned by others, it was the Assessor's contention that the real estate of the Petitioners was properly assessed at fifty per cent (now sixty) of the value set forth in the declaration of consideration appearing in Petitioners' deed from Preston Carroll, and others, adjusted to the number of acres in Webster County.

(34) The Assessor maintained that all recently transferred property was uniformly and equally assessed at fifty per cent (now sixty) of the value declared in the most recent deed of conveyance to a taxpayer. According to the Assessor, the declared consideration set forth in a deed conveying real estate in an arms length transaction between a willing buyer and a willing seller was the most accurate reflection of the market value of the real estate conveyed.

(35) The Assessor, though recognizing the fact that some real estate (coal property) in Webster County, including that of the Petitioners', was being assessed at a higher rate as a consequence of the consideration declared in the taxpayer's deed, asserted that the assessment of property which had not been recently transferred, and therefore had a low, or no, declared value, had nevertheless been increased in assessment periodically, inferentially suggesting that over a period of time equalization would be accomplished through periodic increases in the assessment of property which had not recently changed hands. In support of this position, increases in the assessment of Webster County real estate, between the years of 1983 and 1984, were noted.

(36) As examination of the increase in assessments between 1983 and 1984 does not support the inference.

(37) Though the Assessor appeared to imply that increased assessments of the properties assessed low would eventually result in equalization, it is worthy of note that should the increased assessment applied be applied in like amount in the future an incredible period of years would be required for equalization with Petitioners' present assessment, and should increased assessments be uniformly applied to Petitioners' as well as other property in the future, equalization would, of course, never be accomplished. In fact, the difference between the assessments would become greater, not less.

(38) From the evidence it appears that in making the contested assessments the Assessor did not compare the various features of the property to which the high assessment was applied with the various features of property assessed at a much lower rate.

(39) The Assessor did not procure, examine or consider reports of engineers, geologists, coal appraisers or other persons possessing expertise in any particular field relating to real estate values in assessing Petitioners' coal property.

(40) The questioned assessments were not based upon the presence of economically mineable or removable coal as compared to an absence of the same.

(41) The questioned assessments were not based upon present use or immediately foreseeable economic development of Petitioners' coal property. The Assessor did not consider the size, shape, location, access, or availability of public highways or electricity in assessing the Petitioners' coal property.

(42) The sole basis for the assessment of Petitioners' real estate was, according to the Assessor, the consideration declared in Petitioners' deed.

(43) Upon examination, the Assessor did not contend that Petitioners' assessment was the result of unique or valuable features peculiar only to Petitioners' land. The Assessor admitted on examination that she did not, in making her appraisement, physically inspect or view the Petitioners' real estate, that she had not compared it to adjacent or contiguous tracts, that no scientific examinations or tests had been made or performed by her or at her request or direction and that appraisements had not been sought or considered, including appraisements prepared by the State Tax Commissioner of West Virginia for use by Assessors, in the performance of the duties of that office, and that she had no training or expertise in valuing property, including coal property.

(44) The Assessor admitted on examination that, though she was aware of and had access to the Tax Commissioner's guide for Assessors, in the valuation of coal appraisals and coal deposits, she had not used or attempted to use or apply these materials in the contested assessments.

(45) The record does not disclose that the Assessor ever, in making assessments at issue before this Court, made use of any materials, guides, services or assistance available through the State Tax Commissioner's office.

(46) The Assessor and Commissioner utilized solely the declared consideration in Petitioners' deed as the triggering mechanism for assessing Petitioners' coal property.

(47) The evidence adduced before the Board of Equalization and Review for the assessment years in question, 1981 through 1985, reflects a substantial variance in the per acre assessment of petitioners' coal property and the coal property of most other owners.

(48) Petitioners' Exhibit No. 13, a compilation of the 1983 coal property assessments, derived from the Webster County Land Books, for the magisterial districts of Holly, Hacker Valley, Glade and Fork Lick, reveals that while petitioners' 4,083 acre coal tract in Holly District was assessed at $376.95 per acre, the Cathryn Randolph coal property, comprised of several parcels making up a tract of 1,605.38 acres, also situate in Holly District, was assessed at an average of $21.99 per acre. An 8,482.48 acre tract of coal comprised of fifty parcels, and apparently owned jointly by Juliana Mining Co. and Wolfpen Knobb Dev., was assessed at $48.55 per acre. The 1,018.62 acre tract apparently jointly owned by Hassel Blankenship, Harold Deitz, John McCutcheon and Woodrow Trent was assessed at an average of 19.21 per acre. A 1,365.6 acre tract titled to Hubert Echols, Trustee, was assessed at $22.00 per acre, as was a 100 acre tract

assessed to the Sun Lumber Co., and the 1/12 interest of Hazel Matheny in a tract of 8,132.81 acres.

(49) Though the preceding comparison does not reflect, exactly, the pronounced difference in the assessment of all coal tracts in Holly District, these assessments are generally indicative of the assessment of Webster County coal tracts during the period in question.

(50) The consequence to the revenues of Webster County of the differing assessments becomes evidence if the $376.95 per acre assessment of which the petitioners complain is applied to the coal tracts previously compared.

(51) The assessment of the Cathryn Randolph coal would have been $605,147.99, rather than $35,310.00, a difference in assessment of $569,837.99 per year, had the assessment been $376.95 per acre. The yearly difference in assessment for Juliana-Wolfpen would have been $2,785.646.40, Blankenship, Deitz, McCutcheon and Trent, $364,401.11 and Echols $484,682.00. The total difference in yearly assessment as to these coal interests would have been $4,204,567.40.

(52) Exhibit No. 13 further discloses that whereas petitioners' 3,700 acre coal tract in Glade District was assessed in 1983 at $376.95 per acre, the 2,693 acre coal tract assessed in the name of Mary Coletraine bore a $24.20 per acre assessment. In comparison to the petitioners' assessment, the assessment of a 9,631 acre total tract in Glade District, assessed in the names of Jake Fisher, Robert Bierer, John H. and Ann McCutcheon and W. L. Thomas, was $21.98 per acre. A 1,301 acre coal tract assessed to Bertha Todd was assessed at $22.00 per acre.

(53) The difference in the total assessment of the compared Glade District coal properties and the total assessment of these properties applying the protested per acre assessment is again revealing.

Applying the protested assessment, the Coletraine assessment results in an increase of $949,945.70 from $65,180.60 to $1,015,126.30. The Fisher assessment increases from $211,689.38 to $3,630,405.40, an increase of $3,418,716.10, per year. An application of the 376.95 per acre assessment to the Todd coal property results in a yearly assessment of $490,411.95, an increase of $461,791.95 over the 1983 assessment of $28,622.00.

(54) An examination of the Hacker Valley District coal properties listed in Exhibit No. 13 reveals that Meadowlark Farms was assessed in 1983 as the owner of 13,922.13 acres of coal. The per acre assessment of the Meadowlark coal was $85.58 per acre, a total yearly assessment of $1,197,446.40. By application of petitioners' per acre assessment Meadowlark's assessment becomes $5,274,333.40, an increase of $4,076,887.00.

(55) The Sun Lumber coal properties in Fork Lick District, 12 parcels comprising a 1,178.75 acre total, were assessed in 1983 at $23.81 per acre, an annual assessment of $28,066.03. Application of petitioner's rate of assessment results in a total assessment of $444,329.81, an increase of $416,263.78.

(56) The Pardee Curtin Lumber Company is assessed as the owner of 10,962.89 acres of coal in Fork Lick District. The total assessed value of this coal acreage in 1983, comprised of 108 tracts, was $317,110.00, a per acre assessment of 28.92. The total assessment would have been $4,132,461.30, an increase of 3,815,351.30, had these coal properties been assessed at 376.95 per acre.

(57) From Exhibit No. 13 it appears that, though the coal acreage of some Webster County taxpayers is assessed at more than $100.00 per acre, most of the coal only tracts are assessed at less than $50.00 per acre.

(58) An examination of petitioners' Exhibit No. 5 admitted as evidence during the February 1985, hearing before the Board of Equalization and Review, reflects

that although minor increases in the 1984 per acre assessment of coal tracts of Webster County were made, the pattern of assessments remained essentially the same.

(59) As was the case in the assessments of the real estate of Allegheny Pittsburgh Coal Company and East Kentucky Energy Corporation, the petitioners, Shamrock Coal Company, Inc., and Oneida Coal Company, Inc., have been systematically subjected to assessments that were neither equal nor uniform within the meaning of *West Virginia Constitution*, Article X, § 1, and the equal protection of the Fourteenth Amendment of the *United States Constitution.*

(60) Although it is abundantly clear from the evidence that the assessor and Board of Equalization and Review could have generated substantial tax revenues by equalizing assessments, neither has chosen to do so, relying instead upon a few selected taxpayers to bear a disproportionate share of the tax burden.

DISCUSSION

Article X, Section 1, of the *West Virginia Constitution*, titled *Taxation and Finance* provides, in part, that ". . . taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law."

Article X, Section 1, further provides, in part, that "[n]o one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value . . .".

The West Virginia Supreme Court of Appeals in a case styled, *Killen v. Logan County Com'n.*, W.Va., 295 S.E.2d 689, at Page 693, characterized Article X as being ". . . both a grant of power to the Legislature to tax . . ." by virtue of the provisions of *West Virginia Constitution*

Article 10, §§ 1, 5, and 9, ". . . and a limitation upon that power."

The limitation according to the Court lies in the requirement that the taxation contemplated be "equal and uniform" and in the concept and provision that taxation should be equal on properties of equal value.

Article X, Section 1, according to our Court contemplates the establishment of a system of property taxation in which property, "both real and personal" is subjected to "equal and uniform" taxation, as "directed by law".

The matter of "equal and uniform" property taxation has been addressed by the Legislature through the enactment of various statutes for the implementation of the process of taxation. The process contemplates a statewide system of taxation in which the tax is to be equally and uniformly applied in proportion to the value of the property taxed.

The Supreme Court in *Killen v. Logan County Com'n.*, *supra*, described the process of taxation as consisting of the elements of valuation and levying. Valuation is described as the act of assigning a value to each property to be taxed. Once the value is assigned to a particular property a tax, at a designated rate, is levied, or charged, against the property.

The responsibility of valuation, assigning or placing the value at which property is to be taxed, is that of the County Assessor. This aspect of the process of taxation is known as assessment and is the aspect of the process of taxation at issue before this Court.

Once the County Assessor establishes a value for a property, assesses it, for taxation, various levying bodies, including the State, the County Commissions, local school boards and municipalities determine the rate, or amount, of tax to be levied or collected for each one hundred dollars value assessed. This aspect of the taxation process, known as levying, is not at issue before this Court.

W.Va. Code, § 11-3-1, provides that "[a]ll property shall be assessed (by the assessor) annually as of the first day of July at its true and actual value; that is to say, at the price for which such property would sell if voluntarily offered for sale as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale . . .".

Though our Supreme Court in *Kemp v. Boyd*, W.Va., 275 S.E.2d at 303, recognized that the primary responsibility for the execution of the duty of assessing county property for taxes, ". . . a task requiring foresight, cooperation and detailed labor . . .", rests upon the County Assessors and Commissioners, the Court, in *Tug Valley Recovery Center, Inc., v. Mingo Cty. Comm., W.Va.*, 261 S.E.2d 165, at page 173, in noting the technical and complex nature of the assessment of real estate values, particularly mineral estates, concluded that the task of assessment was ". . . lightened to a great extent by the provisions of *W.Va. Code* § 18-9A-11 . . ." which ". . . provides that the State Tax Commissioner is to make an appraisal of all mineral and surface estates in West Virginia, and that appraisal is to serve as the basis for determining true and actual value for all assessment purposes."

The Court in stating that ". . . once the Tax Commissioner's appraisal has been made . . . it is incumbent upon the Circuit Court, (upon an appeal) as it would be upon the County Commission and the Assessor, to set the assessed value of all parcels of land at the amount established by the State Tax Commissioner.", appears to have attached a substantial significance to the Tax Commissioner's appraisal.

It would seem that the former Assessor, who during her testimony acknowledged receipt of the Tax Commissioner's appraisal of Webster County coal properties, obviously did not attach the same significance, in view of

the fact that after receipt of the appraisal it was placed in a drawer where it remained unused and abandoned until the day of the hearing. The present occupant of the office seems to have adopted substantially the same position as that of his predecessor.

The responsibility of the Tax Commissioner to provide executive oversight for the Assessor, by furnishing property appraisals and correcting incorrect assessment as provided in *W.Va. Code* § 18-9A-11, was emphasized in *Killen v. Logan County Com'm., supra,* at page 694, and again in a case styled *In Re: Tax Assess. Against Pocahontas Land Co.*, 303 S.E.2d 691 (W.Va. 1983), at page 699. Our Court in *Killen*, at page 694, stated that "[t]he State Tax Commissioner has the duty of supervising all of the valuation process. *W.Va. Code*, § 11-1-2; *W.Va. Code* § 18-9A-11."

Though the interrelation between the duties of an Assessor and those of the Tax Commissioner is apparent from an examination of appropriate statutory provisions and cases decided by our Court with reference thereto, the functions of the two offices in the valuation process are different.

In the process of valuation one of the duties of the Tax Commissioner is that of *appraisal*, while that of the Assessor is that of *assessment*. In footnote 5, at pages 694 and 695, our Court, in the *Killen* case, supra, defined an appraisal as generally meaning ". . . the estimate of value given a particular item or piece of property." An assessment was described as meaning ". . . the listing and valuation of property for taxation purposes." Both appraisals and ". . . assessments are to be based on true and actual value. *W.Va. Code* § 11-3-1."

Although the undersigned found no statute or case specifically so stating, it seems, from the statutes and cases examined, that the process of appraisal and assess-

ment contemplated by the Legislature is one in which the State Tax Commissioner has been vested with a general responsibility for the establishment of property values, statewide. The statutes and cases also suggest that the Assessor's duty is that of affirmatively examining and assessing each piece of property, equally and uniformly, within his county. If the process works it would seem that property appraisals and assessments, within county borders and statewide would be uniform.

Logic indicates that although the Tax Commissioner may be aware, in general, of the value of machinery, equipment, motor vehicles, boats, dwellings, buildings, land and other property, both from county to county and statewide, it does not follow the Commissioner, with or without the help of his deputies, would be aware of the condition of all the machinery, equipment, motor vehicles, boats, dwellings, buildings and land, any more than he would be aware of the specific characteristics of a particular parcel of land in Webster County.

Though the Tax Commissioner might have general knowledge of the value of Webster County land, without the benefit of examination the Commissioner would not be aware of whether any given tract was level or precipitous, timbered, farmed or waste land, mined or unmined, accessible or inaccessible or any number of things that could add to, or detract from, the value of the land.

It seems that in vesting the Assessor's Office with the power to assess the Legislature contemplated an assessment process in which the Assessor and his deputies, they being county residents, would go into the county and view the machinery, equipment, motor vehicles, boats, dwellings, buildings, land and other property to be assessed and make a reasoned and rational determination as to value for purposes of assessment. Our Court in *Tug Valley Recovery Center, Inc. v. Mingo Cty. Comm.* W.Va.., 261 S.E.2d 165, at page 173, described "[t]he assessment of real estate value . . ." as ". . . a very

technical and complex area . . . ." and in *Kemp v. Boyd*, supra, described ". . . the mission of assessing county property for taxes as a task requiring foresight, cooperation and detailed labor."

In a case styled *Michael Kline, et al. v. Jim McCloud, et al., etc.*, 326 S.E.2d 715 (W.Va. 1984), at page 718 of the decision, our Court stated that "[i]n determining the fair market value of a piece of land, a county assessor must 'seek out all information which would enable him to properly fulfill his legal obligation.' *In Re Shonk Land Co.*, 157 W.Va. 757, 761, 204 S.E.2d 68, 70 (1974)." In the case at bar it appears from the evidence that the assessment was based solely on the consideration declared in Petitioners' deeds. The Assessor gave no weight or consideration to the appraisals of the Tax Commissioner, engineering reports, geologist's report and a coal appraisal report presented on behalf of Petitioners, or the appraisals submitted. Instead of seeking out information the Assessor seems to have totally refused to consider evidence submitted on behalf of the Petitioners.

However, though recognizing the supervisory authority of the Tax Commissioner in the process of property taxation, our Court appears to hold that an Assessor, in performing the function of property assessment, is not obliged to simply parrot the appraisals of the Commissioner.

The first step in taxing real property is a determination of "true and actual" value. *Kline v. McCloud*, supra, at page 718. In the *Kline* case the Court reaffirmed that true and actual value meant fair market value, the selling price on the open market. Quoting *In Re Shonk Land Co.*, 157 W.Va. 757, at 761, 204 S.E.2d 68, at 70, our Court in *Kline*, at page 718, stated that: "although the assessor is under the supervision of the state tax commissioner he is not restricted in the search for informa-

tion leading to the true and actual value of properties to questions formulated by that state official."

The Court thereafter again affirmed its holding in *Killen* that County Assessors were entitled to consult other credible and reliable sources, including the owner's sworn valuation and bona fide appraisals, as a part of the process of assessment, and were not limited to merely following the appraisals of the State Tax Commissioner.

Finally, the Court, citing *Crouch v. County Court of Wyoming County*, 116 W.Va. 476, 477, 181 S.E. 819 (1935), ". . . recognized that the price paid for real estate . . ." is ". . . a substantial indicia of its true and actual value, so long as the property changed hands in an arm's length transaction. . ." and that although the purchase price paid was not conclusive on the issue of value it is a factor to be considered in an arms length transaction.

From the foregoing it is evident that the Assessor of Webster County had several courses of action available in the matter of the questioned assessments.

The Assessor had the option of basing the assessment, as has been proposed by Petitioners, upon the Tax Commissioner's 1985 appraisals of Webster County coal property. The Assessor did not use or consider the appraisals available through the Tax Commissioner's Office.

In addition, the Assessor had the option of assessing the subject real estate at a rate consistent with the assessment of substantially similar adjacent and contiguous properties. This option was likewise rejected.

The Assessor initially and thereafter, could also have assessed the subject property based on a number of factors including the declared consideration, the Tax Commissioner's appraisals, the assessed value of substantially similar real estate, appraisals presented by or secured from private appraisers, the nature, use access and de-

velopment of the property together with other factors causing or tending to cause the subject property to be worth more, or less than comparable real estate. This option was likewise rejected by the Assessor.

Finally, the Assessor had the option, at that time, of assessing Petitioners' coal property at fifty percent of the consideration declared in the deed. At that juncture the assessment could have been properly made and sustained under the theory that in determining "true and actual" value, for purposes of assessment, the value declared in an arms length transaction substantially indicates the true and actual value of the property conveyed.

At that point, the Assessor would have been entitled to the benefit of the general presumption that the valuation was correct, *Bankers Pocahontas Coal Company v. County Court of McDowell County*, 135 W.Va. 174, 179, 62 S.E.2d 801, 804 (1950), thereby casting upon the taxpayer, the Petitioners, the burden of showing by clear and convincing evidence that the assessment was erroneous. *In Re: Tax Assessments Against the National Bank of West Virginia at Wheeling, et al.*, 137 W.Va. 673, 687, 73 S.E.2d 655, 664 (1952), *In Re Assessment of Kanawha Valley Bank*, 144 W.Va. 646, 109 S.E.2d 649 (1959), *In Re Tax Assess. Against Pocahontas Land Co.*, 303 S.E.2d 691, 699 (W.Va. 1983). Although the assessment when first made, as is shown by the evidence, exceeded the assessment of substantially similar property, the deviation, at that time could have been upheld as a sporadic deviation. However, if an Assessor undertakes to base current real estate assessments on the value declared in recent arms length real estate transactions, he must likewise raise the assessment of similar real estate to a like level, whether or not the similar real estate has been recently conveyed.

Though the initial assessment of Petitioners' coal property may have been presumptively correct, at that time, by failing to equalize assessments, that is, to either raise

the assessment of comparable properties to a level comparable to Petitioners' assessment, or to lower Petitioners' assessment to a level comparable with that at which substantially similar coal property was being assessed, the Assessor failed to achieve equality and uniformity in taxation, as required by Article X, Section 1.

Our Court, in *Killen v. Logan County Com'n.*, supra, at page 701, citing R. Blakey, *Report on Taxation in West Virginia* 107 (1930), noted that

> "The success of the general property tax depends upon the quality of the assessments. If assessments are very unequal the foundation of the entire tax structure is unsound. Inequality of assessments means that *those underassessed pay less than their fair share of public expenses* and *those overassessed pay their full share and, in addition, they have to make up for what the underassessed fail to pay.* The greater the inequalities of assessment the greater the inequalities of the tax and the more grievous the burdens upon those who find it most difficult to meet their obligations. (Emphasis supplied).

In a case decided in 1980, styled, *Matter of U.S. Steel Corp.*, W.Va., 268 S.E.2d 128, at page 132, our Court held that "[w]hile it is true that unintentional, sporadic deviations from an established system are not a sufficient basis for reversal of an assessment . . . [i]t would be totally unacceptable to allow counties to use two systems of assessment, one for favored taxpayers and one for other." Although the facts in the U.S. Steel case are not identical to those in the case at bar, the principle set forth therein is applicable here.

Though the issue confronting this Court, the Assessor, the County Commission and Board of Education of Webster County, has been portrayed in some newspapers as an issue involving the wrongful, and unjustified, refusal

of a foreign corporation to pay lawfully assessed and levied taxes, such is not the case.

The reluctance of the Assessor and a Board of Equalization and Review to increase the real estate assessments, and consequently the real estate taxes, of friends and neighbors to a level comparable to the assessment and levy returned against the Petitioners is understandable. So too is a refusal to lower the assessment of a foreign corporation, especially if to do so has been publicly represented as subjecting the county government and the school system to bankruptcy.

Despite the outcry, however, the evidence presented clearly and convincingly established that the Assessor, and the Board of Equalization and Review, in sustaining the questioned assessments, have, over a period of five years, systematically and intentionally assessed the Petitioners' real estate, and consequently levied taxes against Petitioners' real estate, at a weighted rate per acre of from 471.18% to 753.90% in excess of the weighted rate per acre assessment applied to comparable real estate owned by others and located adjacent, contiguous or near that of the Petitioners, and at a rate of 209.81% more than the Tax Commissioner's assessed value.

The evidence further shows, and the Court so finds, that the inequality of the assessment of Petitioners' real estate and that of comparable tracts has been repeatedly brought to the attention of the Assessor and the Board of Equalization and Review over the five year period involved.

The evidence also demonstrates, and the Court finds, that as Petitioners' have repeatedly and consistently protested the inequality of the assessment of their real estate, as compared to the assessments of comparable real estate owned by others, the Assessor and Board of Equalization and Review, have just as consistently and repeatedly refused to equalize Petitioners' assessment downward or to

equalize the real estate assessment of others upward, though Petitioners' have requested relief in both directions.

Additionally, the evidence discloses, and the Court finds, that the Assessor and Board of Equalization and Review have repeatedly refused to consider or give any weight or credence to the evidence tendered by Petitioners in their prayer for equal and uniform assessments.

Our Court in the *Pocahontas Land Co.* case, 303 S.E.2d 691, at page 699, (W.Va. 1983), held that ". . . where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous. Once this is done, *it is incumbent upon the taxing authority to place some evidence in the record to show why its assessment is correct.*" (Emphasis supplied).

In the matter before this Court, though the Petitioners have demonstrated by clear and convincing evidence that the assessment is erroneous, the taxing authority has not only failed to place evidence in the record to establish the correctness of the assessment, but has totally failed to consider the evidence tendered by the Petitioners.

It would seem from a reading of *Kline v. McCloud*, 326 S.E.2d 715, 719 (W.Va. 1984), that even though an Assessor may ". . . supplement the Tax Commissioner's appraisal report with information obtained from property owners or from recent deed values to determine the value of property without violating the equal and uniform provisions of our State Constitution . . .". If the taxpayer can demonstrate that the real estate of others has been systematically and intentionally undervalued, the taxpayer is entitled to relief under the equal protection clause of the Fourteenth Amendment to the *United States Constitution* and under the equal and uniform clause of Section 1, Article X of the *West Virginia Constitution*. *Kline v. McCloud*, supra, at page 724.

It is further held in *Kline*, at page 724, ". . . that the price paid for property in an arm's length transaction, while not conclusive, is relevant evidence of its true and actual value." It seems to be obvious, therefore, that although an Assessor is at liberty to base real estate assessments upon values or consideration declared in recent conveyances, if the Assessor elects to use recent sales as the basis for the assessment of real estate, he is obligated by the equal protection clause of the Fourteenth Amendment to the *United States Constitution* and the equal and uniform clause of Section 1, Article X, of the *West Virginia Constitution* to base the real estate assessments of substantially similar real estate, whether owned by a corporation or an individual, upon the same or a similar value, depending on certain variables even though the real estate has not been the subject of a recent conveyance.

The evidence clearly demonstrates, and this Court finds, that though the Assessor and Board of Equalization and Review were lawfully entitled to consider the consideration declared in Petitioners' deed in determining their respective assessments, by intentionally and systematically, failing to either equalize assessments by increasing the assessed value of substantially similar property to the level of Petitioners' assessments, or to equalize assessments by lowering Petitioners' assessments to the level at which comparable real estate was being assessed, the Assessor and Board of Equalization and Review violated the equal and uniform clause of Section 1, Article X of the *West Virginia Constitution* and the equal protection clause of the Fourteenth Amendment to the *United States Constitution.*

From the evidence presented, this Court finds that the assessments complained of by Petitioners were incorrect. In this circumstance, pursuant to the provisions of *West Virginia Code* § 11-3-25, the Circuit Court is obligated to "correct the assessment, and fix the property at its

true and actual value." *Tug Valley Recovery Center, Inc. v. Mingo County Commission*, W.Va., 261 S.E.2d 165, 171; *Killen v. Logan County Commisison*, W.Va., 295 S.E.2d 689, 706.

Though our Court, at page 172 of the *Tug Valley Recovery Center, Inc. v. Mingo County Commission*, declined, in view of the full taxation mandates of *West Virginia Code* § 11-3-1 and § 18-9A-1, to reduce the Petitioners' assessment and instead directed an increase in the assessment of the taxpayers who were undervalued, this Court is of the opinion that a reduction of the Petitioners' assessment, in this instance, is proper for several reasons.

First, as our Court noted in the *Killen* decision, at page 703, "[t]he United States Supreme Court . . . [i]n Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923) . . . ruled that where uniformity of taxation and full value assessment could not be reconciled, uniformity took precedence."

In the present matter, though this Court is of the opinion that authority exists to order the Assessor to equalize assessments by increasing the assessment of comparable properties to the level at which Petitioners' property is assessed, the undersigned is further of the opinion that the consideration declared in an arms length transfer of real estate, though relevant as to value, should not necessarily serve as the basis for the assessment of all similar real estate.

Though Petitioners' deed reflects a declared consideration of $10,000,000.00 for 13,238 or 14,038 acres of coal in Webster, Braxton and Nicholas Counties of which 7783 acres is in Webster County, and various assignments of leases and options, though the coal property may in fact have been worth the consideration declared, the differing abilities of various real estate owners to bear the burden of real estate taxes based upon prices paid by the wealthy leads the undersigned to conclude the consideration de-

clared in Petitioners' deed should not, in this case, serve as the basis for the assessment of all substantially similar coal property in Webster County.

The impact of high real estate taxes will obviously be greater upon one of modest income than it will on an individual or corporation possessed of wealth sufficient to purchase real estate at a premium price and in a position to take advantage of various tax write offs available under present tax laws.

The consequence of a high real estate assessment, and tax, will materially vary depending on whether the taxpayer is one of limited or fixed income or is a public utility company, entitled to write off, and to pass on to consumers, the cost of real estate taxes levied. Should uniformity of taxation be attempted through an increase of the assessment of Webster County real estate to the level of that of the Petitioners, it seems probable that individual ownership of real estate of the nature owned by the Petitioners would shortly disappear except for those of great wealth.

Second, from a reading of *W.Va. Code* § 11-3-25, relating to relief in the Circuit Court against an erroneous assessment, it appears that a Circuit Court, in hearing an appeal as contemplated in § 11-3-25, is empowered to fix the true and actual value of property erroneously assessed and to order the refund of excess taxes paid, the probable basis for the public clamor in this matter, if the property is valued too high, and if valued too low, to correct the valuation and fix its true and actual value.

From the foregoing, it is obvious that a Circuit Court is vested with authority to increase or decrease values in the process of correcting erroneous assessments, as an Assessor and a Board of Equalization and Review is vested with authority to increase or decrease assessments to secure equal and uniform property taxation.

Therefore, though our Court appeared to discourage a reduction in valuation to secure equal and uniform taxation, in the *Tug Valley Recovery case*, supra, page 172, it is evident from the provisions of *W.Va.Code* § 11-3-25, and the utilization of this approach by our Court in a series of its decisions: *In Re United States Steel Corp.*, W.Va. 268 S.E.2d 128 (1980); *In Re Tax Assessment Against Pocahontas Land Corp.*, W.Va. 210 S.E.2d 641 (1976); *In Re Assessment of Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959), that where a reduction in the value of property erroneously assessed is necessary to insure uniformity, Circuit Courts are empowered to reduce the values of properties erroneously assessed.

Finally, our Court has emphasized the need to assure uniform property assessment by, among other things, the implementations of appropriate provisions of *W.Va. Code* § 18-9A-11. At page 705 of *Killen v. Logan County Commission*, supra our Court, in emphasizing the need to make use of the Tax Commissioner's appraisals, stated that "W.Va. Code § 18-9A-11 provides that the county officials shall use such appraised valuations as a basis for determining the true and actual value for assessment purposes . . . This Court adheres to the view that 'the use of the word shall without any modification unquestionably makes the direction mandatory.'"

As has been previously noted, *W.Va. Code* § 11-3-25 provides that in instances of erroneous assessment the Circuit Court is to "correct the assessment, and fix the property at its true and actual value". In performing this function, our Court, in *Tug Valley Recovery Center, Inc. v. Minko County Commisison*, 261 S.E.2d 165, at 173, and in *Killen v. Logan County Commission*, W.Va., 295 S.E.2d 689, at 705, stated that "[i]t is incumbent upon the circuit court, as it would be upon the county commission and the assessor, to set the assessed value of all parcels of land at the amount established by the State Tax Commissioner."

Consistent with our Courts' directive and in consideration of the evidence adduced, the Tax Commissioner's Guide of Assessors Valuation of Coal Appraisals, indicating an appraised value for Webster County coal of $360.00 per acre, during the period involved, a reduction in valuation is required.

It is therefore, pursuant to the provisions of *W.Va. Code* §§ 11-3-25, the judgment and order of this Court and this Court finds and fixes the true and actual value of Petitioners' coal property at $360.00 per acre.

It is the further JUDGMENT and ORDER of this Court that the Assessor recompute Petitioners' assessed valuations in a manner consistent with true and actual values hereinbefore found and fixed by this Court, at sixty percent thereof, and that the Sheriff forthwith issue new tax tickets to Petitioners applying the correct levy rate to the corrected valuations and assessments.

It is the further JUDGMENT and ORDER of this Court that the Webster County Commission and Webster County Sheriff refund to Petitioners the unconstitutional taxes paid by Petitioners for the years 1981, 1982, 1983, 1984 and 1985.

To all of which the respondent, The Webster County Commission, by counsel, objects and excepts.

ENTERED this the 13th day of February, 1986.

/s/ Danny O. Cline
DANNY O. CLINE
Judge

Approved as to form:

/s/ W. T. Weber, Jr.
Attorney for Petitioners

/s/ Jack Alsop
Attorney for Respondent

APPENDIX F

IN THE CIRCUIT COURT OF WEBSTER COUNTY
WEST VIRGINIA

CA #2309

IN RE: 1975 TAX ASSESSMENT AGAINST
PARDEE & CURTIN LUMBER CO.

vs.

COUNTY COURT OF WEBSTER COUNTY

CA #2531

IN RE: 1976 TAX ASSESSMENT AGAINST
PARDEE & CURTIN LUMBER CO.

vs.

COUNTY COURT OF WEBSTER COUNTY

CA #2533

IN RE: 1976 TAX ASSESSMENT AGAINST
SUN LUMBER COMPANY

vs.

COUNTY COURT OF WEBSTER COUNTY

CA #2532

IN RE: 1976 TAX ASSESSMENT AGAINST
ALLEGHENY-PITTSBURGH COAL COMPANY

vs.

WEBSTER COUNTY COMMISSION

CA #——

IN RE: 1977 TAX ASSESSMENT AGAINST
ALLEGHENY-PITTSBURGH COAL COMPANY

vs.

WEBSTER COUNTY COMMISSION

CA #78-C-33

IN RE: 1978 TAX ASSESSMENT AGAINST
ALLEGHENY-PITTSBURGH COAL COMPANY

vs.

WEBSTER COUNTY COMMISSION

CA #79-C-38

IN RE: 1979 TAX ASSESSMENT AGAINST
ALLEGHENY-PITTSBURGH COAL COMPANY

vs.

WEBSTER COUNTY COMMISSION

CA #80-C-59

IN RE: 1980 TAX ASSESSMENT AGAINST
ALLEGHENY-PITTSBURGH COAL COMPANY

vs.

WEBSTER COUNTY COMMISSION

CA #81-C-39

IN RE: 1981 TAX ASSESSMENT AGAINST
ALLEGHENY-PITTSBURGH COAL COMPANY

vs.

WEBSTER COUNTY COMMISSION

CA #82 Misc. 26

IN RE: 1982 TAX ASSESSMENT AGAINST
ALLEGHENY-PITTSBURGH COAL COMPANY

vs.

WEBSTER COUNTY COMMISSION

Civil Action No. 84-MSC-8

IN RE: TAX ASSESSMENT AGAINST
ALLEGHENY-PITTSBURGH COAL COMPANY
FOR YEAR 1983

Civil Action No. 84-MSC-9

IN RE: TAX ASSESSMENT AGAINST
EAST KENTUCKY ENERGY CORPORATION
FOR YEAR 1984

Civil Action No. 85-MSC-20

IN RE: TAX ASSESSMENT AGAINST
EAST KENTUCKY ENERGY CORPORATION
FOR YEAR 1985

ORDER

This matter came on to be heard on the 31st day of January, 1986 upon various and sundry matters and there appeared East Kentucky Energy Corporation by Dan O. Callaghan, its attorney and Allegheny-Pittsburgh Coal Company, Pardee & Curtin Lumber Company and The Sun Lumber Company by Ernest V. Morton, Jr., their attorney.

Among other things, Allegheny-Pittsburgh Coal Company, Pardee & Curtin Lumber Company and The Sun Lumber Company, by their attorney moved that in each and all of their cases the principles enunciated and set

forth in the Court's order of November 22nd, 1985 be taken and applied to their specific cases and that the ruling of the Court therein be likewise held to apply to said cases, which motion the Court sustained.

Accordingly, it is hereby ADJUDGED and ORDERED that the rulings and holdings of this Court insofar as the same are applicable thereto, are hereby held and deemed to be the law enunciated and the ruling on the relief sought in each and all of the cases of the said Allegheny-Pittsburgh Coal Company, Pardee & Curtin Lumber Company and The Sun Lumber Company heretofore enumerated.

Enter this 20th day of February, 1986.

Danny O. Cline
Judge

APPENDIX G

IN THE CIRCUIT COURT OF WEBSTER COUNTY
WEST VIRGINIA

Civil Action No. 86-MSC-18

IN RE: ONEIDA COAL COMPANY, INC.,
a corporation

[Filed Mar. 21, 1986]

ORDER

On the 21st day of March, 1986, came Oneida Coal Company, Inc., a corporation, Petitioner, by W. T. Weber, Jr., its attorney, and also came Jack Alsop, Prosecuting Attorney of Webster County, West Virginia, pursuant to order heretofore entered in this action on the 10th day of March, 1986, fixing this day for hearing upon the petition of Oneida Coal Company, Inc., a corporation, for an appeal pursuant to *West Virginia Code* § 11-3-25 from the Commission's denial of relief for equalization and review of assessment of Petitioner's coal property fully mentioned and described in the petition, and thereupon upon argument of counsel for Petitioner and the Prosecuting Attorney of Webster County, West Virginia the Court being of the opinion that Petitioner has timely applied for relief from the assessment of its property in Webster County, West Virginia, in accordance with the provisions of *West Virgina Code* § 11-3-25 and that Petitioner had heretofore notified the Prosecuting Attorney of Webster County, West Virginia, at least ten days prior hereto of the time and place for hearing of its application for appeal, and the Prosecuting Attorney of Webster County, West Virginia having given

at least five days notice of such hearing to the West Virginia State Tax Commissioner, is further of the opinion to and does hereby grant to Petitioner an appeal pursuant to *West Virginia Code* § 11-3-25 from the Webster County Commission's order denying Petitioner's application and petition to the Webster County Commission for equalization and review of assessment of Petitioner's coal property in Webster County, West Virginia, as contained and set forth in Petitioner's petition filed in the County Commission of Webster County, West Virginia, and in Petitioner's petition heretofore filed herein.

Thereupon, this action came on further to be heard upon the petition of Petitioner heretofore filed herein, the testimony and evidence adduced at the hearing before the Webster County Commission, all of which has heretofore been filed herein, the pleadings heretofore filed before the Webster County Commission and in this Court, the order of the Webster County Commission and this Court, notices, memoranda of points, authority and argument of Petitioner and reply thereto of the Prosecuting Attorney of Webster County, West Virginia, and argument of counsel, all of which has been maturely considered by this Court.

[The opinion here repeats verbatim the text of the February 13, 1986 opinion, reproduced at App. 50a-78a, with a change from the plural "petitioners" to "petitioner" throughout, and the addition of a new finding of fact: "(25) That the appraised and assessed values of coal properties in Webster County have not been materially changed or revalued for the years 1981 through 1986, both inclusive." prior to finding (25) at App. 56a, and renumbering of the subsequent findings.]

It is the further JUDGMENT and ORDER of this Court that the Assessor recompute Petitioner's assessed valuations in a manner consistent with true and actual values hereinbefore found and fixed by this Court, at sixty percent thereof, and that the Sheriff issue tax tick-

ets to Petitioner applying the correct levy rate to the corrected valuations and assessments.

To all of which the respondent, The Webster County Commission, by counsel, objects and excepts.

ENTERED this the 21st day of March, 1986.

/s/ Danny O. Cline
DANNY O. CLINE
Judge

Approved as to form:

/s/ W. T. Weber
W. T. WEBER
Attorney for Petitioner

/s/ Jack Alsop
JACK ALSOP
Attorney for Respondent

APPENDIX H

THE CIRCUIT COURT OF WEBSTER COUNTY WEST VIRGINIA

Civil Action No. 86-MSC-17

IN RE: TAX ASSESSMENT AGAINST EAST KENTUCKY ENERGY CORPORATION, 1986 TAXES

ORDER

On the 21st day of March, 1986, this action came on to be heard before the Court, the petitioner-taxpayer appearing by counsel and the respondent, County Commission of Webster County, appearing by its Prosecuting Attorney; upon petition for appeal by the taxpayer from the action of the Webster County Commission sitting as a Board of Equalization and Review of the 1986 taxes of this taxpayer; upon the record of proceedings before the County Commission, sitting as aforesaid, including petitioner's petition for review and equalization filed with the Commission, transcript of testimony taken before the Commission certified as required, all papers filed in the proceeding, all orders of the Commission, all exhibits introduced before the Commission, all being the complete full record of all proceedings before the Commission, together with copy of petitioner's notice to the Prosecuting Attorney of Webster County; upon review of all of said materials by the Court; upon argument of counsel; upon consideration of all of which, the Court makes the following:

FINDINGS OF FACT

1. The Assessor has assessed the properties of this taxpayer in Webster County in exactly the same manner as

they were assessed for the year 1985 and previously, which assessments have been approved and confirmed by the Webster County Commission, sitting as aforesaid, without change.

2. The Assessor has assessed all other property in Webster County, with a few minor exceptions, on exactly the same basis as done for the year 1985 and previous years. These assessments have likewise been confirmed by the County Commission, sitting as aforesaid.

3. The facts set forth in the previous order of this Court dated November 22, 1985, in consolidated Civil Actions 85-MSC-20, et al., are exactly the same, are applicable to this case and are adopted by the Court herein, reference is here made to said Order.

CONCLUSIONS OF LAW

1. There being no change in the facts, all of the conclusions of law previously set forth in the order of the Court dated November 22, 1985, are hereby adopted as conclusions of the Court herein and reference to said order is here made.

2. This petitioner-taxpayer is entitled to relief from the assessment as prayed for for all the reasons set forth in the previous order of the Court dated November 22, 1985, and therefore the assessments should be reduced accordingly. It is, therefore,

ORDERED AND ADJUDGED that the relief prayed for by the petitioner-taxpayer in its petition be granted and that the valuations be reduced as set forth in the previous order of the Court dated November 22, 1985, for all the reasons set forth therein; it is, further:

ORDERED AND ADJUDGED that all of the findings of fact and conclusions of law and orders of the Court set forth in the order of the Court dated November 22, 1985, are hereby incorporated by the Court herein and made the order of the Court in this action; it is, further:

ORDERED AND ADJUDGED that the Assessor recompute petitioner's valuations in the matter consistent with true and actual values hereinbefore found and fixed by this Court in its order of November 22, 1985, at 60% thereof, and that the Assessor forthwith issue new tax tickets to petitioner applying the correct levy rate to the corrected valuations and assessments. Whereupon, the parties, by counsel, announced to the Court that they had agreed on the amount of tax for the year 1986 in accordance with the order of the Court dated November 22, 1985, in the amount of $28,045.08 ($14,022.54 per half less discount if paid within the time prescribed by statute to obtain same or plus interest as provided by statute if not so paid, all per computation attached hereto and made part hereof) without any of the parties waiving any right they might have on appeal; upon the County Commission, by its attorney, specifically objecting; upon consideration of all of which the Court was of the opinion that the total amount thus computed was correct in accordance with its order of November 22, 1985, subject to all rights of the respondent, County Commission, to appeal and without waiver of any such right; upon the Court being of the opinion that said amount when paid would discharge the tax obligation of said taxpayer for the year 1986, without waiving any right of appeal of the County Commission or petitioner; upon consideration of all of which it is, further:

ORDERED AND ADJUDGED that when the petitioner-taxpayer, East Kentucky Energy Corporation, pays to the Sheriff of Webster County the sum of $14,022.54 per half (less discount if paid within the time provided for by statute for same or plus interest as provided by statute if not so paid), same will discharge the tax obligation of this petitioner-taxpayer for the tax year 1986, subject to all rights of appeal by the County Commission, none of this consisting of a waiver by it of any and all issues it wishes to raise thereby; to all of which the County Commission, by its counsel, objects and excepts.

ENTER: 21st day of March, 1986.

/s/ Danny O. Cline
Judge

APPROVED FOR ENTRY BY:

/s/ Dan O. Callaghan
Attorney for Petitioner-Taxpayer
East Kentucky Energy Corporation

INSPECTED BY:

/s/ Jack Alsop
Attorney for Webster County
Commission

APPENDIX I

ORDERS—WEBSTER COUNTY COMMISSION

Regular Session, February 1, 3, 6, 8, 10, 15, 1984

BEFORE THE COUNTY COMMISSION
OF WEBSTER COUNTY, WEST VIRGINIA

IN RE: TAX ASSESSMENT AGAINST
EAST KENTUCKY ENERGY CORPORATION

ORDER

On the 15th day of February, 1984, this action came on to be heard before the County Commission of Webster County, sitting as a Board of Equalization and Review, duly called upon the Petition of East Kentucky Energy Corporation in regard to its assessment within Webster County for the year 1984; upon evidence presented to the Commission in the nature of Stipulation of Fact and Issues of Law to be decided by it; upon exhibits presented to the Commission which were likewise stipulated and agreed; upon evidence produced by the County of Webster; upon consideration of all of which it is:

ORDERED AND ADJUDGED that the Petitioners failed to prove that the property in the name of East Kentucky Energy Corporation is improperly valued on the land books for the year 1984; it is, further:

ORDERED AND ADJUDGED that the Petitioner, East Kentucky Energy Corporation has failed to produce evidence that the method by which the Assessor of Webster County arrived at the value of said land was not "equal and uniform" as required by the Constitution of West Virginia, Art. X, § 1; it is further:

ORDERED AND ADJUDGED that the Assessor, by using an "equal and uniform" method properly arrived at the assessed value for Petitioner's property and that said assessment was proper: it is, further:

ORDERED AND ADJUDGED that the relief prayed for by East Kentucky Energy Corporation is hereby denied; and, it is further:

ORDERED AND ADJUDGED that the Assessor extend the taxes in accordance with the value assessed on the land books 1984.

ENTER: 15th day of February, 1982 [sic].

Webster County Commission

By ERNEST F. AYERS
President

E. M. COOL
Commissioner

JOE ADAMS
Commissioner

ORDERS—WEBSTER COUNTY COMMISSION

Board of Equalization & Review,
February 1, 4, 7, 12 and 15th, 1985

BEFORE THE WEBSTER COUNTY COMMISSION SITTING AS A BOARD OF EQUALIZATION AND REVIEW

IN RE: TAX ASSESSMENT AGAINST
EAST KENTUCKY ENERGY CORPORATION

On the 1st day of February, 1985, this action came on to be heard before the County Commission of Webster County, West Virginia, sitting as a Board of Equalization and Review in regard to its assessment within Webster County, West Virginia for the taxable year 1985.

Whereupon, the petitioner commenced the presentation of its evidence, and, thereafter, the parties announced to the Commission that this matter was to be continued for further presentation of its evidence on the 12th day of February, 1985.

On the 12th day of February, 1985, there reappeared the parties, and, thereafter, the parties resumed the presentation of the evidence.

Upon evidence produced in this matter, upon consideration of all of which, the Commission does hereby find as follows:

1. Based upon all the evidence adduced at the hearing, including the evidence adduced by the taxpayer, the Commission is of the opinion that the true and actual value of the property owned by East Kentucky Energy Corporation is $29,842,500.00.

2. The Commission is further of the opinion that East Kentucky Energy Corporation has failed to prove by a preponderance of the evidence that the method by which the Assessor of Webster County, West Virginia arrived at the value of the property of East Kentucky Energy Corporation within Webster County, West Virginia was not "equal and uniform" as required by the Constitution of West Virginia, Article 10, Section 1.

It is accordingly ADJUDGED and ORDERED that the Assessor arrived at the assessed value for the petitioner's property and that the assessment is proper.

It is further ORDERED AND ADJUDGED that the relief prayed for by East Kentucky Energy Corporation is hereby denied, and it is further ORDERED and ADJUDGED that the Assessor extend the taxes in accordance with the values assessed therein on the land books for 1984.

ENTERED: February 15, 1985.

/s/ Joe Adams

/s/ E. M. Cool

/s/ Ernest F. Ayers

BEFORE THE WEBSTER COUNTY COMMISSION
SITTING AS A BOARD OF EQUALIZATION
AND REVIEW

IN RE: TAX ASSESSMENT AGAINST
EAST KENTUCKY ENERGY CORPORATION

ORDER

On the 14th day of February, 1986, this action came on to be heard before the County Commission of Webster County, West Virginia, sitting as a Board of Equalization and Review in regard to its assessment within Webster County, West Virginia for the taxable year 1986.

Upon evidence produced in this matter, upon consideration of all of which, the Commission does hereby find as follows:

1. Based upon all the evidence adduced at the hearing, including the evidence adduced by the taxpayer, the Commission is of the opinion that the true and actual value of the property owned by East Kentucky Energy Corporation is $29,842,500.00.

2. The Commission is further of the opinion that East Kentucky Energy Corporation has failed to prove by a preponderance of the evidence that the method by which the Assessor of Webster County, West Virginia arrived at the value of the property of East Kentucky Energy Corporation within Webster County, West Virginia was not "equal and uniform" as required by the Constitution of West Virginia, Article 10, Section 1.

It is accordingly ADJUDGED AND ORDERED that the Assessor arrived at the assessed value for the petitioner's property, and that the assessment is proper.

It is further ADJUDGED and ORDERED that the relief prayed for by East Kentucky Energy Corporation is hereby denied, and it is further ORDERED and ADJUDGED that the Assessor extend the taxes in accordance with the values assessed therein on the land books for 1986.

DATED: 3-18-86.

/s/ Ernest F. Ayers

/s/ E. M. Cool

IN THE COUNTY COMMISSION
OF WEBSTER COUNTY, WEST VIRGINIA,
SITTING AS A BOARD OF EQUALIZATION
AND REVIEW

ORDER

The County Commission of Webster County, West Virginia, sitting as a Board of Equalization and Review, does hereby, on the 27th day of February, 1981, certify that it has completed the assessments for the 1981 Land Books and does order the Assessor of Webster County not to use the 1981 assessments of mineral properties based on the West Virginia Tax Commissioner's method of valuation for coal properties, but to reduce those to comply with the method of assessments utilized for the year 1980, and otherwise to extend the levies as provided upon the 1981 Land Books.

ORDER, ENTER: February 27, 1981.

/s/ Ernest F. Ayers

/s/ Coy D. Gillespie

/s/ Joe Adams

Sitting as a Board of
Equalization and
Review

IN THE COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA SITTING AS A BOARD OF EQUALIZATION AND REVIEW

The County Commission of Webster County, West Virginia, sitting as a Board of Equalization and Review, does hereby, on the 15th day of February, 1982, certify that it has completed the assessments for the 1982 Land Books and does order the Assessor of Webster County to extend the levies as provided upon the 1982 Land Books.

All objections and petitions presented before this Court meeting as the Board of Equalization and Review have been considered and the relief prayed for is denied.

ORDER, ENTER: February 15, 1982.

/s/ Ernest F. Ayers
President

/s/ Coy D. Gillespie
Commissioner

/s/ Joe Adams
Commissioner

BEFORE THE COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA ACTING AS THE BOARD OF EQUALIZATION AND REVIEW

IN RE: TAX ASSESSMENT AGAINST
ONEIDA COAL COMPANY

ORDER

This 15th day of February, 1983, the County Commission of Webster County, sitting as the Board of Equalization and Review, having considered the petition of Oneida Coal Company, a corporation, in regard to its assessment within Webster County, West Virginia for the year 1982, and the Commission, after considering said evidence and considering the evidence produced by the County of Webster, is of the opinion that the petitioner has failed to prove that the property in the name of Oneida Coal Company is improperly valued on the Land Books for the year 1982, and the said Oneida Coal Company, having failed to produce evidence that the method by which the Assessor of Webster County arrived at the value of said land was not uniform and equal, as required by the Constitution of West Virginia, Article 10, Section 1, and the County having produced evidence and proven that the Assessor, by using a uniform and equal method properly arrived at the assessed land value and that said assessment was proper, the relief prayed for by the said Oneida Coal Company is hereby denied, and it is further ordered that the Assessor extend the taxes in accordance with the value assessed on the 1981 Land Books.

ENTERED: February 15, 1983.

/s/ Ernest F. Ayers
ERNEST F. AYERS

/s/ E. M. Cool
E. M. COOL

ORDERS—WEBSTER COUNTY COMMISSION

Regular Session, February 1, 3, 6, 8, 10, 15, 1984

BEFORE THE COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA ACTING AS THE BOARD OF EQUALIZATION AND REVIEW

IN RE: TAX ASSESSMENTS AGAINST ONEIDA COAL COMPANY

ORDER

This 23rd day of February 1984, the County Commission of Webster County, sitting as the Board of Equalization and Review, having considered the petition of Oneida Coal Company, a corporation, in regard to its assessment within Webster County, West Virginia, for the year 1983, and the Commission, after considering said evidence and considering the evidence produced by the County of Webster, is of the opinion that the petitioner has failed to prove that the property in the name of Oneida Coal Company is improperly valued on the Land Books for the year 1983, and the said Oneida Coal Company, having failed to produce evidence that the method by which the Assessor of Webster County arrived at the value of said land was not uniform and equal, as required by the Constitution of West Virginia, Article 10, Section 1, and the County having produced evidence and proven that the Assessor, by using a uniform and equal method properly arrived at the assessed land value and that said assessment was proper, the relief prayed

for by the said Oneida Coal Company is hereby denied, and it is further ordered that the Assessor extend the taxes in accordance with the value assessed on the 1981 Land Books.

ENTERED: FEBRUARY 23, 1984.

/s/ Ernest F. Ayers
ERNEST F. AYERS

/s/ E. M. Cool
E. M. COOL

/s/ Joe Adams
JOE ADAMS

ORDERS—WEBSTER COUNTY COMMISSION

Board of Equalization & Review,
February 1, 4, 7, 12, 15, 1985

BEFORE THE WEBSTER COUNTY COMMISSION SITTING AS A BOARD OF EQUALIZATION AND REVIEW

IN RE: TAX ASSESSMENT AGAINST
ONEIDA COAL COMPANY

On the 1st day of February, 1985, this action came on to be heard before the County Commission of Webster County, West Virginia, sitting as a Board of Equalization and Review in regard to its assessment within Webster County, West Virginia for the taxable year 1985.

Whereupon, the petitioner commenced the presentation of its evidence, and, thereafter, the parties announced to the Commission that this matter was to be continued for further presentation of its evidence on the 12th day of February, 1985.

On the 12th day of February, 1985, there reappeared the parties, and, thereafter, the parties resumed the presentation of the evidence.

Upon evidence produced in this matter, upon consideration of all of which, the Commission does hereby find as follows:

1. Based upon all the evidence adduced at the hearing, including the evidence adduced by the taxpayer, the Commission is of the opinion that the true and actual

value of the property owned by Oneida Coal Company is $5,867,600.00.

2. The Commission is further of the opinion that Oneida Coal Company has failed to prove by a preponderance of the evidence that the method by which the Assessor of Webster County, West Virginia arrived at the value of property of Oneida Coal Company within Webster County, West Virginia was not "equal and uniform" as required by the Constitution of West Virginia, Article 10, Section 1.

It is accordingly ADJUDGED and ORDERED that the Assessor properly arrived at the assessed value for the petitioner's property and that the assessment is proper.

It is further ORDERED and ADJUDGED that the relief prayed for by Oneida Coal Company is hereby denied, and it is further ORDERED and ADJUDGED that the Assessor extend the taxes in accordance with the values assessed therein on the land books for 1984.

ENTERED: February 15, 1985.

/s/ Joe Adams

/s/ E. M. Cool

/s/ Ernest F. Ayers

BEFORE THE WEBSTER COUNTY COMMISSION
SITTING AS A BOARD OF EQUALIZATION
AND REVIEW

IN RE: TAX ASSESSMENT AGAINST
ONEIDA COAL COMPANY, INC.

ORDER

On the 14th day of February, 1986, this action came on to be heard before the Commission of Webster County, West Virginia, sitting as a Board of Equalization and Review in regard to its assessment within Webster County, West Virginia for the taxable year 1986.

Upon evidence produced in this matter, upon consideration of all of which, the Commission does hereby find as follows:

1. Based upon all the evidence adduced at the hearing, including the evidence adduced by the taxpayer, the Commission is of the opinion that the true and actual value of the property owned by Oneida Coal Company, Inc. is $5,867,600.00.

2. The Commission is further of the opinion that Oneida Coal Company, Inc. has failed to prove by a preponderance of the evidence that the method by which the Assessor or Webster County, West Virginia arrived at the value of the property of Oneida Coal Company, Inc. within Webster County, West Virginia was not "equal and uniform" as required by the Constitution of West Virginia, Article 10, Section 1.

It is accordingly ADJUDGED and ORDERED that the Assessor arrived at the assessed value for the petitioner's property and that the assessment is proper.

It is further ADJUDGED and ORDERED that the relief prayed for by Oneida Coal Company, Inc. is hereby denied, and it is further ADJUDGED and ORDERED that the Assessor extend the taxes in accordance with the values assessed therein on the land books for 1986.

ENTERED: 3-18-86.

/s/ Ernest F. Ayers
/s/ E. M. Cool

APPENDIX J

STATEMENT PURSUANT TO RULE 28.1

SHELL OIL COMPANY *

A. *Shell Oil Company*

Subsidiary Companies

IND/AG Chemicals, Inc.
Pecten Arabian Company
Pecten Cameroon LNG Limited
Pecten Chemicals Inc.
Pecten Export Corporation
Pecten Middle East Services Company
Pecten Trading Company
Pecten Ventures Limited
Pecten Vietnam Company
SES, Incorporated
Shell Agricultural Chemical Company
Shell Capital, Inc.
Shell Communications, Inc.
Scallop Corporation
Shell Credit, Inc.
Shell Energy Resources Inc.

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* Shell Oil Company's parent corporation is Shell Petroleum Inc., which, in turn, is owned directly and indirectly by Royal Dutch Petroleum Company (a Netherlands corporation) and The "Shell" Transport and Trading Company, p.l.c. (a United Kingdom corporation). Shell Oil Company itself owns directly or indirectly, both 100% and less than 100% stock interests in approximately 120 corporations that operate both in the United States and in foreign countries. All of the companies are often referred to collectively as the "Royal Dutch/Shell Group of Companies." Counsel is advised that there are subsidiaries, not wholly owned, and affiliates throughout the world of this group which, in the aggregate, are so numerous that they could not be determined or identified for the Court within the time frame for filing this Petition for Certiorari.

Shell Export Company
Shell Investment, Inc.
Shell Motorist Club, Inc.
Shell Pipe Line Corporation
Shell Polymers and Catalysts Enterprises Inc.
Triton Biosciences Inc.
Western Farm Services, Inc.

Affiliated Companies

Fractionation Research, Inc.
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
Loop, Inc.
Lucky Chance Mining Company, Inc.
Mesbic Financial Corporation of Houston
Oil Companies Institute for Marine Pollution Compensation Limited.
Oil Insurance Limited
Seadock, Inc.

B. *Shell Credit, Inc.*

Subsidiary Companies

Shell Finance Company
Shell Leasing Company

C. *Shell Energy Resources Inc.*

Subsidiary Companies

Pecten International Company
Shell Gas Pipeline Company
Shell Gas Trading Company
Shell Mining Company
Shell Offshore Inc.
Shell Western E&P Inc.
Scallop Coal Company

D. *Pecten International Company*

Subsidiary Companies

Pecten Argentina Company
Pecten Ash Sham Company
Pecten Bahamas Company
Pecten Belize Company
Pecten Brazil Alagoas Company
Pecten Brazil Alagoas Petroleum Company
Pecten Brazil Amazon Company
Pecten Brazil Amazon Exploration Company
Pecten Brazil Amazon Exploration and Development Company
Pecten Brazil Amazon Petroleum Company
Pecten Brazil Bahia Company
Pecten Brazil Bahia Exploration Company
Pecten Brazil Bahia Exploration and Development Company
Pecten Brazil Bahia Petroleum Company
Pecten Brazil Exploration Company
Pecten Brazil Maranhao Company
Pecten Brazil Maranhao Exploration Company
Pecten Brazil Petroleum Company
Pecten Brazil Rio Grande Do Norte Company
Pecten Cameroon Company
Pecten Canada Limited
Pecten Ecuador Company
Pecten Guinea-Bissau Company
Pecten Malaysia Company
Pecten Malaysia Petroleum Company
Pecten Orient Company
Pecten Overseas Petroleum Company
Pecten Paraguay Company
Pecten Portugal Company S.A.R.L.
Pecten Potiguar Company
Pecten Santos Company
Pecten Santos Exploration Company
Pecten Santos Petroleum Company

Pecten Sarawak Company
Pecten Syria Company
Pecten Syria Petroleum Company
Pecten Tanzania Company
Pecten Tunisia Company
Pecten Victoria Company
Taranaki Offshore Petroleum Company

E. *Shell Mining Company*

Subsidiary Companies

Bellaire Trucking Company
Pecten Coal International Inc.
R. & F. Coal Company
Triton Coal Company
Turris Coal Company
Billiton Metals Inc.
Billiton Minerals U.S.A. Inc.

F. *Shell Offshore Inc.*

Subsidiary Companies

Burrwood Gathering Company
SOI Royalties Inc.

G. *Shell Western E&P Inc.*

Subsidiary Companies

Belridge Farms
Belridge Packing Co.
Chaparro Gathering Company
Choctaw Pipe Line Company
Swepi Royalties Inc.
Shell California Offshore Pipeline Inc.
Shell Cortez Pipeline Company
Shell Western Pipelines Inc.
East Texas Salt Water Disposal Company

Grande Ecallie Land Company, Inc.
Thums Long Beach Company
Van Salt Water Disposal Company
WIDC (Wyoming Industrial Development Corporation)

H. *Shell Cortez Pipeline Company*

Affiliated Company

Cortez Capital Corporation

I. *Pecten Arabian Company*

Subsidiary Company

Pico Limited

J. *Taranaki Offshore Petroleum Company*

Subsidiary Company

Taranaki Offshore Petroleum Company Limited

K. *Shell Chemical Company*
(a division of Shell Oil Company)

Affiliated Companies

George Newman & Company
United Scientific, Inc.

L. *Pecten Trading Company*

Affiliated Company

Oil Companies Institute for Marine Pollution Compensation Limited

M. *Western Farm Service, Inc.*

Subsidiary Company

Pioneer Equipment Co.

N. *Shell Pipe Line Corporation*

Subsidiary Companies

Butte Pipe Line Company
San Joaquin Valley Pipe Line Company

Affiliated Companies

Dixie Pipeline Company
Explorer Pipeline Company
Locap, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company

O. *Shell Polymers and Catalysts Enterprises Inc.*

Subsidiary Companies

Ardyne Inc.
CRI Ventures, Inc.
Morrison Molded Fiber Glass Company
Premix/EMS Inc.
Quazite Corporation
Rampart Packaging Inc.
Xerkon Inc.

P. *Morrison Molded Fiber Glass Company*

Subsidiary Companies

AFC, Inc.
Glastrusions, Inc.
Glass-Steel, Inc.

Q. *Scallop Coal Company*

Subsidiary Companies

Justin Coal Corportaion
Marrowbone Development Company
Wolf Creek Collieries Company
Shell Coal Terminal Corporation

R. *Billiton Metals Inc.*

Subsidiary Companies

Billiton Commodies Inc.

S. *Scallop Corporation*

Subsidiary Companies

AP Shipping Corporation
Argus Realty Services Inc.
Asiatic Petroleum Corporation
Greater New York Terminal, Inc.
Houston Fuel Oil Terminal, Inc.
Nickerson American Plant Breeders Inc.
Royal Lubricants Company, Inc.
Scallop Liquified Natural Gas, Inc.

T. *Marrowbone Development Company*

Subsidiary Companies

Big Beaver Coal Company

U. *Shell Coal Terminal Corporation*

Subsidiary Companies

Clipper Coal Corporation
Comcoal Corporation
East Kentucky Energy Corporation
Kermit Coal Company
Pike County Coal Corporation
Redbone Coal Company, Inc.
Massey Coal Terminal S. C. Corporation
SLT Corporation
Sunset Coal Corporation
Tug River Mining Group, Inc.

V. *Massey Coal Terminal S. C. Corporation*

Subsidiary Companies

Cooper River Coal Terminal Company

SUN COMPANY, INC.

Elk River Resources, Inc.
Sun Coal, Inc.

- Elk River Minerals Corporation
- Sun Coal East, Inc.
- Wyoming Resources Corporation
  - Cordero Mining Co.
  - Sunedco Coal Co.
  - Bighorn Ranch, Inc.
- Utah Resources Corporation
  - Soldier Creek Coal Co.
  - Sage Point Coal Co.
- Jewell Resources Corporation
  - Jewell Coal & Coke Company, Inc.
  - Jewell Smokeless Coal Corporation
  - Jewell Supply Company
  - Dominion Coal Corporation
  - Cumberland Coal Collieries, Inc.
- West Virginia Resources Corporation
  - Oneida Coal Company, Inc.
  - Scott Equipment Company
- Kentucky Resources Corporation
  - Shamrock Resources Corporation
    - Greenleaf Equipment Company
    - Shamrock Coal Company, Inc.
  - Whitaker Resources Corporation
    - Whitaker Coal Corporation
    - Ray Coal Co., Inc.
    - R.A. Whitaker Trucking Company

No. 87-1310

Supreme Court, U.S.
FILED
MAR 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

EAST KENTUCKY ENERGY CORPORATION, ONEIDA COAL COMPANY, INC. and SHAMROCK COAL COMPANY, INC.,

Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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or call collect (402) 342-2831

QUESTIONS PRESENTED

The respondent respectfully disagrees with the petitioner's presentation of the questions raised in its Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia and feels that the following more fairly represents the question for review:

1. May a County Tax Assessor use information from recent deed values to determine the true and actual value of property without violating the guarantee of equal protection in the Fourteenth Amendment to the Constitution of the United States?

2. Whether the State of West Virginia's remedy that taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced as long as their property is valued at market value, instead, they should seek to have the assessments of other taxpayers raised to market value, violates the equal protection in the Fourteenth Amendment to the Constitution of the United States.

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No. 87-1310

In The

Supreme Court of the United States

October Term, 1987

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Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATEMENT OF THE CASE

West Virginia, like 39 other States and thousands of local governments throughout the Country, imposes an ad valorem tax on the ownership of real property within its jurisdiction. Since the amount of the tax levied is based on the value of the property, it is necessary to ascertain the value of the different parcels of property owned in the State. In West Virginia and many other jurisdictions responsibility for that task rests, in the first instance, with the county assessor.

Once the county assessor establishes the actual value of the particular parcels of property—the "appraised value"—he applies an appropriate percentage—50 percent in West Virginia—to arrive at the "assessed value." The tax is then levied as a percentage of the assessed value of the property. There is no issue in this case concerning discriminatory tax levies or the application of discriminatory assessment percentages. There is no issue in this case that the appraised value exceeds the true and actual or market value of subject property.

Petitioner, East Kentucky Energy, owns 7,374 acres of property in Webster County, West Virginia. Petitioner, Oneida, owns some 7,783 acres of property in Webster County previously owned by its sister corporation, petitioner, Shamrock. East Kentucky Energy purchased its property from Allegheny-Pittsburgh Coal Company in 1982 for some $30 million. Shamrock purchased the Oneida-Shamrock property in 1977 for some $5.9 million. The tax assessor for Webster County relied exclusively upon there purchase prices in arriving at the appraised value of petitioners' property for the years at issue, and then took 50 percent of the appraised value to arrive at the assessed value. East Kentucky Energy's property was thus taxed on the basis of an assessed value of some $15 million, and Oneida-Shamrock's on the basis of an assessed value of some $3 million.

The Assessor for Webster County, West Virginia for the aforesaid period of time, and in accordance with the policy of that office, assessed all real estate that was subject to a recent transfer based upon fifty percent of the

value contained in the declaration of consideration of value of the deed, without exception.

In addition to the assessment of real property that had transferred with a declaration of consideration of value, the Assessor raised the assessed values of properties that had not undergone a recent transfer by ten per cent in 1976, 1981 and 1983, in an attempt to raise assessments of nontranferred real property so as to meet the equal and uniform provision of the U. S. Constitution and the W. Va. Constitution.

The Assessor for Webster County, West Virginia assessed all personal property at fifty percent of its true and actual value during the period in question.

The Assessor for Webster County, West Virginia assessed property in each class in the aforesaid manner, applying uniformly to all classes of property within the County, the methodology of assessment.

Petitioners sought review of their assessments in the Webster County Circuit Court "on the grounds that the assessments violated the equal and uniform clause of article X, section 1 of the West Virginia Constitution, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

According to the evidence, there are approximately thirty two million tons of coal recoverable by the strip mining method alone on the subject tracts owned by East Kentucky Energy, and this estimate is based on proven reserves. (Appendix A, p. 22a).

The Circuit Court of Webster County, West Virginia found in its order of November 22, 1985 that there were

numerous other tracts within the area of the subject tracts that were assessed at a value substantially less than the assessed value of Allegheny Pittsburgh/East Kentucky Energy, while the value of Allegheny Pittsburgh/East Kentucky Energy was $1,688.64 per acre from 1976 through 1983 and $2,043.00 per acre from 1984 through 1986. (Petitioner's Appendix p. 21a).

No evidence was ever adduced at the hearings held before the Board of Equalization and Review as to the market conditions of the adjoining comparable tracts, as to the proven reserves upon those tracts, nor was any evidence ever adduced as to the true and actual value of the adjoining comparable tracts.

The Circuit Court of Webster County, West Virginia found by final order entered on December 13, 1985 that the assessment of the Allegheny Pittsburgh/East Kentucky Energy property was in violation of the equal and uniform clause of Section 1, Article X of the West Virginia Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The Circuit Court of Webster County, West Virginia ordered that the appraised value of the fee and coal tracts of the subject property of East Kentucky Energy be $360.00 per acre, with an assessed value of sixty (60) percent of $360.00 per acre or $216.00 per acre.

The Circuit Court of Webster County, West Virginia ordered that the appraised value of the surface tracts of the subject property be $300.00 per acre with an assessed value of $180.00 per acre.

Based upon the order of the Circuit Court of Webster County, West Virginia as aforesaid, the total appraised values of the subject tracts is $2,893,117.90, with an assessed value of $1,735,869.00.

The County Commission appealed the Circuit Court orders to the Supreme Court of Appeals of West Virginia, the State's highest court, and the various cases were consolidated for purposes of appeal. On July 17, 1987, the Supreme Court issued a per curiam opinion reversing the Circuit Court and ordering reinstatement of the assessments previously set by the County Commission. The Supreme Court concluded that the consideration recited in petitioner's deeds reflected the true and actual value of petitioners' property, that the record does not support the trial Court's ruling that the actions of the assessor and board of review constitute "intentional and systematic" discrimination. The assessments based upon the price paid for the property in arm's length transactions are an appropriate measure of the "true and actual value" of appellees' property.

The uniform use of recent deed values as the basis for appraising property subject to ad valorem taxation does not violate the equal and uniform provision of the Constitution of West Virginia or the United States.

The decision of the West Virginia Supreme Court, according to the judgment duly entered indicated that Chief Justice McGraw, Justices Neely, Miller, and McHugh concurred in the decision with Justice Brotherton, dissenting and would affirm the trial judge. (Petitioner's Appendix B, p. 2a).

Such judgment was affirmed when the West Virginia Supreme Court denied the petitioner's request for a rehearing. (Petitoner's Exhibit C, p. 14a).

———o———

REASONS FOR REFUSING THE WRIT

This Court has adopted a properly deferential standard in reviewing claims of discriminatory taxation and has granted to the States broad leeway in handling of tax matters and the administration of the same, especially where the only issue is an allegation of equal protection.

The case presents no substantial federal question as to denial of equal protection for this Court's review and the decision of the West Virginia Supreme Court is consistent and in accordance with the principles pronounced in *Leggitt v. Lee*, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed.2d 929 (1933) as to remedies available to taxpayers who believe other property may be underassessed.

———o———

ARGUMENT

I. MAY A COUNTY TAX ASSESSOR USE INFORMATION FROM RECENT DEED VALUES TO DETERMINE THE TRUE AND ACTUAL VALUE OF PROPERTY WITHOUT VIOLATING THE GUARANTEES OF EQUAL PROTECTION IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

As the West Virginia Supreme Court of Appeals in its opinion in this case stated: "The present case is somewhat analogous to those situations where an assessors makes a partial reappraisal of property which results in such property receiving a higher value than other property or there is a disparate valuation between tax districts. *Courts have rather uniformly rejected equal protection and uniformity of taxation arguments in such cases.* (Emphasis own) (Petitioner's Appendix A, p. 10a).

The West Virginia Supreme Court in the case of *Kline v. McCloud,* 326 S.E.2d 715 (W. Va. 1984) extensively reviewed decisions of various jurisdictions dealing with the equality and uniformity issues stated, commencing at page 720:

> "Our research discloses very few cases dealing with this precise issue. In *Meyer v. Cuyahoga County Bd. of Revision,* 58 Ohio St.2d 328, 390 N.E.2d 796 (1979), a local board of education filed a petition with the county board of tax revision to have the Meyers' real estate reassessed to reflect its 1973 purchase price of $120,000. The propertys' value had been established at $3,410 by the county auditor's 1970 sexennial appraisal. The board of revision increased the value to $120,000.

The Meyers argued on appeal that using the purchase price rather than the sexennial appraisal figure violated equal and uniform taxation principles because other homeowners' properties were valued according to the sexennial appraisal.

The Supreme Court of Ohio noted prior cases in which it had "rather consistently held that the best evidence of true value is the actual sale price of the property in an arm's length transaction." 58 Ohio St.2d at 333, 390 N.E.2d at 799. The Court went on to address the unequal taxation issue arising from the Meyers' claim that other property owners' values were based on the sexennial appraisal rather than deed sales, quoting from *Southern Ry. Co. v. Watts*, 260 U.S. 519, 526, 43 S.Ct. 192, 195, 67 L.Ed. 375, 387 (1923):

The rule is well settled that a taxpayer although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others . . . But, unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause."

See also *Shaw v. Bd. of Revision of Cuyahoga County*, 70 Ohio St.2d 255, 436 N.E.2d 1033 (1982).

Finding no intentional and systematic discrimination, the Court in Meyer refused to grant any relief, giving this general summary: The system of taxation unfortunately will always have some inequality and nonuniformity attendant with such governmental function. It seems that perfect equality in taxation would be utopian, but yet, as a practicality, unattainable. We must satisfy ourselves with a principle of reason that practical equality is the standard to be applied in these matters, and this standard is satisfied when the tax system is free of systematic and intentional departures from this principle." 58 Ohio St.2d at 335, 390 N.E.2d at 800.

The use of sale prices in reappraising property was also challenged on uniformity of taxation grounds in *Merlino v. Tax Assessors for Town of N. Providence*, 114 R.I. 630, 337 A.2d 796 (1975). In that case, the assessed value of plaintiffs' house was increased from $12,300 to $18,900 when they purchased it in 1972. They argued that this increase was unconstitutional because there had not been a general revaluation of property in their community since 1960, and property which had not been sold since then had not been reassessed.

The Court held that the plaintiffs could not make out a cause of action unless they could show that there had been a "systematic, intentional undervaluation of the property in the locality." 114 R.I. at 639, 337 A.2d at 802. This burden was not met merely by showing that other properties in the same area were not revalued in 1972. Instead, they had to show "that a substantial amount of property was taxed at a lower percentage of fair market value than their property." id. Since they failed to meet this burden, the Court denied relief.

The present case is somewhat analogous to those situations where an assessor makes a partial reappraisal of property which results in such property receiving a higher value than other property or there is disparate valuation between tax districts. Courts have rather uniformly reflected equal protection and uniformity of taxation arguments in such cases. In *Spooner v. Akew*, 345 So.2d 1055 (Fla. 1976), for instance, the court refused to accept an equal protection argument where taxpayers in one county claimed their property was valued higher than the property in other counties.

In *In Re Hawaiian Land Co.*, 53 Hawaii 45, 487 P.2d 1070 (1971) appeal dismissed sub nom. *Hawaiian Land Co. v Director of Taxation, State of Hawaii*, 405 U.S. 907, 92 S.Ct. 938, 30 L.Ed2d 778 (1972), an

assessor selected certain properties to be valued annually while others were valuated every two or three years. The annually valuated taxpayer claimed this resulted in a higher assessment on its property and constituted violation of equal protection and uniform taxation, but the Court rejected this argument. The Idaho Supreme Court found no equal protection or uniform taxation problem where piecemeal reappraisals were made over a period of time with property being assessed at the new appraisal figure instead of waiting until all property had been reappraised. *Justus v. Bd. of Equalization*, 101 Idaho 743, 620 P.2d 777 (1980). This same result was reached in *Recanzone v. Nevada Tax Comm'n.*, 92 Nev. 302, 550 P.2d 401 (1976). See also *Melvin v. Dunn*, 607 P.2d 694 (Okla. 1980); *State ex rel. Fort Howard Paper Co. v. State of Wisconsin Lake District Bd. of Review*, 82 Wis.2d 491, 263 N.W.2d 178 (1978); Annot., 76 A.L.R.2d 1077 (1961).

Further, this Court has held that "The States have a very wide discretion in the laying of their taxes. When dealing with the proper domestic concerns, and not thereby upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. Of course, the States, in the exercise of their taxing powers, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment, but that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of taxation. The State may impose different specific taxes upon different trades and professionals and may vary the rate of excise upon various products. It is not required to resort to close distinctions

or to maintain a precise, scientific uniformity with reference to composition, use or value. *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526-527, 79 S.Ct. 437, 440-441, 3 L.Ed.2d 480, 486 (1955), *Lahnhauser v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351, 354-55 (1973).

Further, this Court has stated "where taxation is concerned and no specific federal right, apart from equal protection, is implied, the States have large leeway in making classifications and drawing lines in which their judgment produce reasonable systems of taxation. *Lehnhauser v. Lake Shore Auto Parts Co., supra,* 410 U.S. at 359, 93 S.Ct. at 1003, 35 L.Ed.2d at 351.

The actions by the County Assessor in this case is clearly in conformity with the principles previously enunciated herein.

The evidence is undisputed that the County Assessor found the true and actual value of the property based upon the declaration of consideration of value and that the Assessor equally and uniformly applied a rate of fifty to the appraised value. (Petitioner's Appendix A pp. 4a-5a).

There is further absolutely no dispute that the valuation of the property was based on the true and actual value of the property of the petitioners. In fact, the petitioners concede in their petition filed herein that the price paid was an appropriate measure of the property value. (Petitioner's Petition at page 14-15).

The value being proper, the uniform use of declaration of consideration of purchase price paid in deed transactions, is not violative of the equal and uniform provision

of the Fourteenth Amendment to the United States Constitution.

Further, the West Virginia Supreme Court specifically held that the actions by the County Assessor were not an intentional and systematic discrimination against the petitioners and therefore would not be in violation of this Court's holding in *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441 (1923) that there must be an intentional violation of the essential violation of practical uniformity.

The evidence in this record reveals that the petitioner fails to come within the principles enunciated in *Sioux City Bridge Co. v. Dakota County (supra)* for two reasons.

First, the evidence adduced at the trial level, fails to prove that there are any other properties situated in Webster County, West Virginia of the same value of the petitioners that are underassessed. The petitioners have purchased a very valuable tract of coal property.

In the record, the evidence adduced at the hearing before the Board of Equalization and Review, held on February 12, 1985, the testimony of the expert, *Mullanex, for East Kentucky Energy testified that other tracts in the area have the same geological strata but that he did not have any proven reserves as to those "comparable tracts."* (Emphasis own). Mullanex further testified that the reserves are proven on the East Kentucky Energy properties and that there were at *least thirty two million tons of coal recoverable by the strip mining method alone.* (Emphasis own) (Appendix A, p.21a). Anyone knows that coal properties which have proven reserves are of a much greater value than coal properties with unproven reserves.

None of the protesting taxpayers offered competent testimony through appraisers, experts or the like as to the true and actual values of *the comparable tracts and that these tracts were not assessed at true and actual value.* The statistical data submitted by the protesting taxpayers was a *mere compilation* of the values on the land books *without regard* to the *location, topography, accessibility* or *other factors* that may affect market value. (Emphasis own).

With the record being void of such evidence, the petitioners claim of denial of equal protection must fail.

Secondly, the record is void of any evidence of a systematic and intentional discrimination toward the petitioners on any class that the petitioners are a member of. There is absolutely no evidence that there was a different rate or a different methodology in arriving at the value of the petitioners' property.

The West Virginia Supreme Court found, which finding was supported by the evidence, that "It was the policy of the assessors office during the relevant time period to access all recently transferred property on the basis of 50 percent of the declaration of consideration of value. There appears to be no dispute that this method was uniformly followed for all such property."

In addition to that, the County Assessor took action to raise the valuation of property which had not been recently conveyed by raising the values by ten percent in the years 1976, 1982 and 1984 and the Supreme Court so found (Petitioner's Appendix A at 6a.)

Therefore, the petitioners have failed to prove any intentional and systematic discrimination against them.

II. WHETHER THE STATE OF WEST VIRGINIA'S REMEDY THAT TAXPAYERS WHO CLAIM THAT THEY ARE BEING OVERASSESSED IN RELATION TO OTHER TAXPAYERS MAY NOT HAVE THEIR ASSESSMENTS REDUCED AS LONG AS THEIR PROPERTY IS VALUED AT MARKET VALUE, INSTEAD, THEY SHOULD SEEK TO HAVE THE ASSESSMENTS OF OTHER TAXPAYERS RAISED TO MARKET VALUE, VIOLATE THE EQUAL PROTECTION IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The respondents strongly disagree with the petitioner's assertion that the lower Court's holding that "taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced as long as their property is valued at market value. Instead, they should seek to have the assessments of other taxpayers raised to market value," was critical to the lower Court's holding and assert that the assessments by the County Assessor are equal and uniform as applied to all properties throughout the taxing district.

Nevertheless, the respondents do agree that it is the settled law of the State of West Virginia that if a taxpayers property is assessed at market value, if the taxpayer believes that other property is not assessed at market value, his remedy is to compel the other assessments to be raised and he is not entitled to have it lowered.

As cited in the petitioner's petition (at page 25), many jurisdictions have followed this principle as to the relief to which the taxpayer is entitled.

Such relief is entirely proper and in accordance with the principles enunciated by this Court in its holding in

Leggett v. Lee, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed.2d 929 (1933).

In the words of Mr. Justice Roberts: "Under the law of Florida, every unity for the taxpaying public has an interest in having all property subject to taxation legally assessed, and may in behalf of himself and others in like situations require that all property subject to taxation be placed on the tax books and bear its proportionate part of the expense of government. The appellants, if they deem the tax illegally omitted in certain cases, may apply for a writ of mandamus to compel the taxing officials to do their duty. *State ex rel. Dofnos Corp. v. Lehman et al.*, 100 Fla. 1401, 131 So. 333 (1930). Failure to collect the tax from some whose occupations fall within the provisions of the act cannot excuse the appellants from paying what they owe. And certainly the remedy afforded by state law assures them equal treatment along with all others similarly situated."

Accordingly, such a remedy is not violative of the equal protection clause of the Fourteenth Amendment.

———o———

CONCLUSION

For the foregoing reasons, this Court should refuse the petition for writ of certiorari, thus affirming the judgment of the Court below.

Respectfully submitted,

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APPENDIX A

IN THE COUNTY COMMISSION OF
WEBSTER COUNTY, WEST VIRGINIA

IN RE: TAX ASSESSMENTS AGAINST EASTERN KENTUCKY ENERGY CORPORATION FOR 1985

The following proceedings were had before the County Commission of Webster County, West Virginia, sitting as a Board of Review and Equalization, on the 1st and 12th days of February, 1985.

APPEARANCES

FRANK AYERS, JOE ADAMS and E. M. COOL, Commissioners of the County Court of Webster County, West Virginia.

JACK ALSOP, Prosecuting Attorney of Webster County, West Virginia.

CALLAGHAN, CALLAGHAN, RUCKMAN & VAUGHAN, (Mr. Dan O. Callaghan, appearing), counsel for Eastern Kentucky Energy Corporation.
JOHN L. CAMPBELL, Certified Court Reporter.

* * *

(p. 71) as a Board of Equalization and Review of the 1985 taxes.

RONALD MULENEX, a witness called on behalf of the Petitioner, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CALLAGHAN:

Q Would you state your name, please?

A Ronald Mullenex.

Q And how old are you, Mr. Mullenex?

A Thirty-five.

Q Where do you live?

A Bluefield, West Virginia.

Q By whom are you employed?

A Geological Consulting Services, Incorporated.

Q How long have you been in that business?

A Eight years.

Q What is the purpose of Geological Consulting Services, Incorporated?

A Well, we evaluate coal properties, explore and evaluate mineral properties and specifically coal properties.

Q Okay, do you do coal mapping?

A Yes, sir.

Q And do you explore coal properties?

A Yes.

Q And do you value coal properties?

(p. 72) A Yes.

Q What is your training?

A Well, I've got a bachelor and masters degree in geology from West Virginia University and I have been working as a geologist for over ten years, in the coal end of geology.

Q Okay, after you first graduated from college where did you first go to work?

A I worked for the West Virginia Geological Survey for two and a half years and then Geological Consulting Services.

Q And what type of services or work did you do with the West Virginia Geological Survey?

A I was involved in mapping of coal seams and determining resources, particularly coal seams in West Virginia.

Q And where were you stationed?

A Well, I was stationed initially in Morgantown and then in the southern part of the state.

Q When did you join Geological Consulting Services?

A In 1977.

Q Are you a certified professional geologist?

A Yes.

Q Explain what that means.

A Well, it is not really licensing, but it is a certification, a nationwide certification, through a professional organization. It is not a requirement but the acceptance into (p. 73) the membership and being certified depends a lot on your qualifications and your ethic conduct.

Q Do you have to take an examination to be certified?

A No, it's not really an examination.

Q Do you have to take any examination for certification for your work?

A No, it is based on experience and to a large degree on your illustrated competency over years of experience and your ethical conduct.

Q What societies do you belong to?

A I'm a member of the Geological Society of America and the Geological Mining Institute and the American Society of Professional Geologists.

Q Have you authored or co-authored any books or publications?

A Yes.

Q Would you list those for us, please?

A One was the depositional trends of the Pocahontas number three coal seams and another was entitled cross strike structures of the central Appalachians and another was the use of depositional models for defining new coal resources in the Appalachian region, or something close to that.

MR. CALLAGHAN: Now, I would offer Mr. Mullenex as a duly qualified expert in the field of geology to testify in (p. 74) this matter. Mr. Alsop, do you wish to cross-examine Mr. Mullenex on his qualifications?

MR. ALSOP: No.

BY MR. CALLAGHAN:

Q All right, Mr. Mullenex, have you had occasion to map and do studies of the property of Eastern Kentucky

Energy Corporation located in Glade District of Webster County?

A Yes.

Q You actually prepared a map in which we have formerly marked for identification as Exhibit A?

A Yes.

Q Is that a copy of Exhibit A that now hangs on the blackboard?

A Yes.

Q Is that the map you prepared?

A Yes.

Q Would you step down and point out to the Court the property owned by Eastern Kentucky Energy Corporation?

A It is the area shown in green on this map. There are two colors, green and yellow, and the green area is the Eastern Kentucky Energy property. The yellow areas are adjacent properties that are comparable.

MR. ALSOP: I am going to object to that. There is not sufficient foundation laid for him to testify that those are (p. 75) comparable properties.

BY MR. CALLAGHAN:

Q Have you conducted studies to determine if in fact these are comparable properties?

A Well, I have conducted studies on the Eastern Kentucky Energy property and I also have done studies

on one of the adjacent properties, but certainly not on all of them.

Q But you have made a determination, have you not, that these properties —

MR. ALSOP: Mr. Callaghan, you are leading the witness.

BY MR. CALLAGHAN:

Q Have you determined —

MR. CALLAGHAN: I can do that, Mr. Alsop. There are no formal rules of evidence here.

BY MR. CALLAGHAN:

Q Have you determined that these properties marked in yellow are comparable geologically to the properties of Eastern Kentucky Energy?

A Geologically they are comparable.

Q Now, wait a minute. Have you made the determination?

A I have regarding particularly one of those.

Q All right, can you state, are you prepared to state within a reasonable degree of scientific certainty that these properties marked in yellow on this map are comparable (p. 76) properties geologically?

A Yes.

Q And you so state?

A Yes.

Q Now, explain to us what studies you made to make that determination?

A Well, as I said we have conducted reserve studies on Eastern Kentucky Energy's property here at another point in time. I have also been involved in the study of this adjacent property.

Q Would you please identify that adjacent property?

A This is 3-Q-1 property.

Q Okay, tell us how you arrived at a conclusion that they are in fact comparable.

A Can I use this?

Q Have you prepared another map that you want to use in your testimony?

A Yes.

Q And is this the map that you have prepared?

A Yes.

MR. CALLAGHAN: I would ask the reporter to mark this as Exhibit A-1.

THEREUPON, the exhibit was marked as requested.

BY MR. CALLAGHAN:

(p. 77) Q Mr. Mullenex, would you please describe what Exhibit A-1 is?

A This is a map showing coal seam distribution on Eastern Kentucky Energy's property, which is the green area here and it is outlined in orange on this one. The scales are different, but the property is the same. The

property shown in yellow on Exhibit A are outlined in yellow on A-1 on this map. The colored areas pertain to areas where certain coal seams occur within that property. There is a little schematic profile section over here on the side of the exhibit and it keys to colors and cross sections back to what is shown on the map. In other words, this area at the top is the area that is underlaid by Freeport coal and that corresponds, the pink color corresponds to this area here, which is a mountain top appearing on the Eastern Kentucky Energy property, which the Freeport coal is under that area. That is under the pink area. Then you have the upper, the middle and the lower Kittaning seams, which appear below the Freeport. You will notice once you get below that the rest of this area has been left white because from our studies on the property we have determined that there are no mineable coal seams below the last area that is colored here.

Q All right, would you please identify the colors and what seams they represent?

(p. 78) A Okay. The pink area refers to the area where the Freeport coal is present. The purple area is where the upper Kittaning coal is present. The bluish-green color is where the middle Kittaning seam occurs and the green is where the seam that was identified as the lower Kittaning seam in the old West Virginia Geological Survey map.

Q And what is the source of that map?

A This map itself comes from the State Tax Department. It is a Webster County mineral identification map, showing where the coal seams occur.

Q Did you use that map in your studies of the Eastern Kentucky Energy properties and the other properties that you have marked in yellow?

A Yes, it is used to show you roughly where the coal seams occur. It is rather generalized, but it is used for exhibit purposes.

Q All right, what other sources have you investigated to make the determination which you did?

A Well, the other sources would include all the information that has been collected and put together by the West Virginia Geological Survey. They mapped the entire county back in the teens. As I said, our company has done work on adjacent properties, adjacent to Eastern Kentucky, as a separate study and not part of the Eastern Kentucky study.

(p. 79) Q All right, you may take your seat again. Now, Mr. Mullenex, based upon your education and your educational background and based upon your experience as a geologist and based upon the studies you have made of the Eastern Kentucky Energy property and the surrounding properties in yellow, can you state within a reasonable degree of scientific certainty that these properties are comparable geologically?

A Yes.

MR. ALSOP: I'm going to object to that question. I think that is a hypothethical question that calls for a conclusion and relies on facts that are not in evidence. Mr. Mullenex has stated that the only property which he has done any study on, adjacent properties, was in fact 3-Q-1, and that he has not done any work on any other properties

and further he has not laid a proper foundation as to any type of studies that he has done on Eastern Kentucky property to give that opinion. Therefore, I object to the question.

BY MR. CALLAGHAN:

Q Mr. Mullenex, in making your conclusion did you base it upon all the things I have just recited to you?

A Well, yes. We have actually done drilling on the Eastern Kentucky property and on another property. We are talking about 3-Q-1, where I've actually had access to logs of bore hole records and I have found the same seams to occur (p. 80) basically on both properties. As a matter of fact there are a couple of seams that appear on the 3-Q-1 property that is shown as mineable, but from the information that we have from drilling are not mineable on Eastern Kentucky's property. In addition to the four seams that are shown there in that profile section, there are a lot of other named seams, horizon seams, present on all the properties in the area, but not all of those seams are going to be mineable at any given point. In fact, the seams that are shown there are not mineable throughout Eastern Kentucky's property but only a part of them. As far as comparing this area with the surrounding property, geologically, those same seams are present on all the other properties and that is what the exhibit shows. If you go into the properties that are highlighted in yellow you see the same colors occurring there. The same coal seams are present there. On one of them I have done studies on which seams are actually mineable. I haven't done that on all of them, but I know that the coal is there and I know that the chances of them being mineable are

just as good there as they are on these properties that we are talking about. And further, there are other seams that could be mineable that are not mineable on the Eastern Kentucky property.

Q And you so state with a reasonable degree of scientific certainty?

(p. 81) A Yes. There may be some variations, depending on which individual seam is mineable from one property to the other, but in the long run they are very similar properties located within the same area and there is no geological reason that they should not be comparable.

Q Now, these properties, I believe, I will hand you now what has been marked as Petitioner's Exhibit B and ask you if these are the actual lists of properties keyed to the map that you prepared?

A Yes, Exhibit A.

Q Let us go down through them one by one. 3-Q-1 is identified on both Exhibit B and also identified on the map. Is that correct?

A Yes.

Q Would you step down and go to the map and identify them?

A Okay.

Q Now, the second tract identified is 4-Q-13, the Dorsey Carpenter tract, and would you point that out?

A Yes, sir. It is right here.

Q Now, number three is 4-N-13 and that is the Nellie Mace and J. E. Hopkins tract. Would you point that out?

A Yes, it is right here.

Q You are indicating that?

(p. 82) A Yes, it is right here.

Q 2-N-8 is identified as the Tioga Lumber Company tract. Would you point that out?

A Yes, sir.

Q You are pointing that out now?

A Yes.

Q 3-P-10 is the A & R Coal Development Company tract. You are now pointing that out?

A Yes.

Q 3-P-9 is the A & R Coal Development Company tract and you are now pointing that out?

A Yes.

Q 2-L-5 is the M. B. Partners Limited tract and you are now pointing that out?

A Yes.

Q 3-R-7 is the H. R. Dietz tract and you are now pointing that out to the Commission?

A Yes.

Q And tract nine is 3-P/1-6-7-8, the J. N. Tulley tract and would you point that out?

A That is this cluster of tracts here.

Q Now, you may take your seat. I will hand you what has been marked as Exhibit C in the record and is

identified as Eastern Kentucky Energy Corporation properties. Are you (p. 83) familiar with those tracts?

MR. ALSOP: I object to that characterization. It is not in the record. It has not been introduced into evidence.

MR. CALLAGHAN: I didn't say that, did I?

MR. ALSOP: I think you did.

MR. CALLAGHAN: I think I said that it had been marked for identification. Okay, I will ask him this.

BY MR. CALLAGHAN:

Q I will hand you what has been marked as Exhibit C, Eastern Kentucky Energy Corporation's properties, and I will ask you if these are the properties of Eastern Kentucky Energy contained within the green area on your map?

A Yes.

Q They are various tracts, is that right?

A Yes.

Q But they are all contained within that green area?

A Yes.

MR. CALLAGHAN: You may cross-examine.

CROSS-EXAMINATION

BY MR. ALSOP:

Q Mr. Mullenex, when did you do the study on 3-Q-1?

A It was done in 1981.

Q And who did you do that for?

A It was done on behalf of A. T. Massey.

(p. 84) Q What type of study did you do on 3-Q-1?

A It was a reserve evaluation.

Q By reserve evaluation, exactly what did you do?

A Well, we took the information that was available, consisting of drillers' logs and bore holes and evaluated the mineable coal reserves on the property.

Q Do you have that information with you here today?

A No, not in detail.

Q Not in detail?

A No, sir.

Q As I understand on Exhibit A-1 this area right here, that is 3-Q-1?

A Yes, sir. Actually the property included that. It also included—I was mistaken before when I told you that it was all 3-Q-1, because it also included parts of 2-N-8 properties also.

Q So your study included that?

A That is right.

Q You say you had core holes or core borings?

A That is right.

Q When were they done?

A They had been done probably most of them in the late seventies. I don't know the specific dates.

Q Now, the purple area shown there is upper Freeport (p. 85) and upper Kittaning seam?

A Well, yes, that is the interval between the two. In other words, the base of the purple would be the position of the upper Kittaning seam.

Q Do you know the thickness of that co...?

A To recall, it would vary of course, but it was mineable and would probably be in the range of four to six feet in thickness.

Q Do you recall specifically as to whether it was or it wasn't?

A Well, I remember specifically that it was a mineable seam. Yes. Of course, it would vary in thickness across the property.

Q As a matter of fact coal seams do vary across property?

A Certainly.

Q And under geological surveys and based upon the terrain and so forth you may expect a coal seam to be present, but until such time as additional work, such as coal borings are done, you don't know whether that coal seam is in fact present?

A That is correct. You don't have that proof.

Q You do not have that proof?

A No, sir.

Q And coal throughout this area, as it is throughout (p. 86) West Virginia, varies in thickness?

A Yes, sir.

Q Quality?

A Yes, sir.

Q And mineability?

A Certainly.

Q As to the middle Kittaning seam, do you know the thickness of that coal?

A Again, not specifically, but I do recall that it was a mineable seam and again would vary in thickness across the property. It was generally of thickness and mineable quality.

Q And the lower Kittaning seam, do you recall the thickness of that seam?

A Again, it was generally mineable.

Q Generally mineable?

A Yes, sir.

Q But you can't recall the exact thickness?

A No, sir.

Q When did you perform your work for Eastern Kentucky Energy as to the subject tract?

A Well, it was done in '82.

Q It was done prior to the time they purchased it, wasn't it?

A About the time. I'm not sure. I don't know what (p. 87) their purchase date was.

Q You don't recall the purchase date?

A No, sir, I don't. I don't know that I ever knew it.

Q If the purchase date was on or about the 15th day of July, 1982, was your work performed prior or subsequent to that date?

A I'm not sure of the actual date of the completion of the study.

Q And did you submit that study to them in writing?

A Yes.

Q And do you have copies of that?

A I do, but not here.

Q Did you make certain recommendations to them in regard or give them certain opinions in regard to the mineability of the coal upon that property?

A Yes.

Q And I believe the four seams designated on the map are in fact found on the subject tract in mineable quantities, is that correct?

A In mineable quantities on parts of the tract. Not throughout.

Q But a substantial portion of that tract of property contains mineable coal, isn't that right?

A Yes.

(p. 88) Q In fact, does your study not show that the mineable coal on the subject tract is in greater quantities than it is on the adjacent tracts?

A No, it doesn't show that at all.

Q It doesn't show that at all?

A No, sir.

Q As I understand it the area in the orange is the area that is the subject tract?

A Yes, that is right.

Q And on the upper Freeport seam is found on the subject tract, is it not?

A Yes, sir.

Q And in mineable seams?

A Yes, it is mineable.

Q And it is not found on 3-Q-1, is it?

A No.

Q The Freeport and upper Kittaning seams are found on the subject tract in mineable quantities, is it not?

A The upper Kittaning?

Q Yes.

A Yes.

Q And as well as the upper and middle Kittaning?

A Yes.

Q And the middle and lower Kittaning are found in (p. 89) mineable quantities on that tract, isn't that correct?

A Over parts of the tract, yes.

Q And did you perform this reserve study for them when they were exploring the possibility of purchasing this property?

A Yes.

Q And you supplied that information to them?

A Yes, but I don't know the date of the transaction.

Q As to 2-N-8, are there any coal borings on that tract?

A Yes.

Q And what did those coal borings reveal as to 2-N-8?

A Again, they were mineable seams, very much the same mineable seams that occur on the Eastern Kentucky Energy property.

Q And you did that for A. T. Massey?

A Yes.

Q And they were exploring the possibility of purchasing these tracts?

A Yes, I would assume.

Q And to your knowledge those transactions did not occur?

A That is right.

Q As to 2-L-5 and the mineable seams designated as coal distribution as designated on A-1, that is your opinion (p. 90) based upon the geological strata of this property?

A That is right.

Q There are no coal borings to your knowledge and you did not have any?

A No, I did not have access to any.

Q Is is your opinion on the information that you had?

A That is right.

Q And likewise as to 4-N-13, 4-Q-13, 3-R-7 and the 3-P series?

A Yes. Let us take 4-N-13. We did drill a bore hole very near to the boundary between 4-N-13 and the Eastern Kentucky property.

Q By near, what do you mean?

A Well, I would say within 1,000 feet of the property boundary. It was near enough that a projection could be made into the adjacent property.

Q You did not do any study on the adjacent tract?

A No.

Q And you are not aware of any studies made on the adjacent tract?

A No.

Q You did not, did you, on behalf of your client submit any of this information to the assessor of Webster County, did you?

(p. 91) A No.

Q And to your knowledge it has not been submitted, isn't that correct?

A I have no knowledge of that.

Q Mr. Mullenex, did you form an opinion as to the mineable and marketable coal on 3-Q-1?

A Not on that specific tract because that was part of a larger tract which also included 2-N-8 and several other properties too. It was a much larger property and I wouldn't have anything broken out on that small a scale.

Q Did you form an opinion as to the number of mineable and merchantable coal on this subject tract?

A Yes.

Q And what is that opinion?

A About 32,000,000 tons.

Q And that 32,000,000 tons, what was the breakdown as to seams?

A Well, as to seams, about 1.8 million in Freeport.

Q Is the Freeport present in the deep mine or strip mine?

A All of these were treated and considered as strip mine coal.

Q In other words, there was 32,000,000 tons of strip-mine coal located on the subject tract?

A That is right.

(p. 92) Q What about deep mine, did you form any opinion as to whether there was any mineable coal by the deep mine method?

A Well, some of these coals could be recoverable by either method. We treated them as surface mine reserves in our study. We did do some drilling, a very limited amount of drilling, to test deeper seams to determine if there was potential there and on the basis of the initial

drilling we saw no promise for any additional deep mine reserves. The exploration was really stopped at that point, after the initial phase.

Q And that was done prior to the time that you submitted your report to Eastern Kentucky?

A Yes, sir.

Q What other seam or seams did you form an opinion to as to the mineable and marketable coal?

A The upper Kittaning seam would be about 10.8 million, about eight and one-half million in the middle Kittaning and in the seam that would have been referred to as the lower Kittaning by the West Virginia Geological Survey was actually referred to as the Clarion and that was about 10.9 million.

Q What point beneath the surface do you first find the Freeport seam?

A It depends on where you are on the surface because, as that map will show, some places you are below where the seam (p. 93) outcrops and it is above you on the mountainside.

Q Would this be a piece of property which you would designate as being the subject of mountaintop removal?

A Yes, sir.

Q And with the mountaintop removal situation, what would be the average cover on the Freeport seam?

A I don't recall the specifics of how much it was on the average throughout the area.

Q But it is true, is it not, Mr. Mullenex, that the size of the tract we have, being the subject tract and the amount of recoverable coal on the tract, that is an excellent piece of coal property?

A Yes, part of it is. The thing is the area we are looking at that has all of that reserve is the western part of the property. The eastern half of the property has hardly any. To the best of our determination so far there is hardly any reserve on the eastern side of the tract.

Q Per acre on the western side what is the amount of recoverable coal on the subject tract?

A The total tract, I don't know how many acres we would have there in the east versus the west. The tract is what, 7,200 acres?

Q Do you recall what that would be?

A On the grand total we are talking about 4,400 tons (p. 94) per acre.

Q Using the total tract acreage, is that what you are saying?

A Yes.

Q Using the total tract it would average out to 4,400 tons per acre?

A Yes.

Q But you are not able to tell us the number of tons of recoverable coal on the western portion of that tract versus the number of recoverable tons on the eastern part of the subject tract?

A No, I don't have that information with me.

Q It is true, is it not, that Exhibit A-1 depicts that nowhere in the immediate area do you find coal of the quantity and the number of seams as you do on this subject tract?

A That is not so.

Q Would you show me in the other areas where you find it in that quantity, other than the subject tract?

A Okay, this tract here has a larger distribution in terms of total acres.

Q And what tract is that?

A This is 2-L-5.

Q Do you have an opinion as to the number of tons of recoverable coal under the 2-L-5 tract?

(p. 95) A No, I don't.

Q Then how can you say that that tract has more coal, more recoverable coal, than the subject tract?

A I didn't say that it does. I said that it has a larger distribution of acreage of these seams, of the same seams, that were found to be mineable than the Kentucky Energy property. A much larger percentage of this tract's total acreage is covered by these other seams.

Q But there is not the quantity of coal within that area as the subject tract, is there?

A I can't say that.

Q You don't know that, do you?

A I can't say. The thing is it is a smaller tract to begin with.

Q And being a smaller tract that would affect the value, would it not?

A Well, the subject tract is a conglomeration of small tracts.

Q But that conglomeration of tracts was placed together by one common owner?

A Yes, sir.

Q And it would be subject to mining the seams of coal on that conglomerate tract?

A Yes, sir.

(p. 96) Q And based upon the core borings it is your opinion that there is 32 million tons of recoverable coal?

A Yes.

Q And in that area there is not a conglomerate of other tracts that has 32 million tons of recoverable coal, is there?

A I don't know that this tract is owned by a common interest. So, I can't really answer that.

Q You can't really say that is a comparable tract, can you?

A Geologically I can.

Q What do you mean by geologically?

A I mean it has the same coal seams present in the area.

Q It does have or is it based upon your projections that it should have?

MR. CALLAGHAN: Wait a minute, Jack. Give him an opportunity to answer.

THE WITNESS: It does have.

BY MR. ALSOP:

Q It does have?

A It has the same geological strata graphic positions present. Yes.

Q But as to the subject tract those are proven?

A Yes, sir.

Q But you do not have that on 2-L-5?

(p. 97) A That is right.

MR. ALSOP: I have no further questions.

REDIRECT EXAMINATION

BY MR. CALLAGHAN:

Q Mr. Mullenex, there is a total of approximately 7,200 acres of Eastern Kentucky Energy property, is that right?

A Yes, the Eastern Kentucky tract is 7,200 acres.

Q And have you determined approximately how many acres of that 7,200 acres is underlaid with mineable coal?

A About 1,500 acres.

Q About 1,500 acres?

A Yes, sir.

MR. CALLAGHAN: No further questions.

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Supreme Court, U.S.
FILED
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No. 87-1310

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EAST KENTUCKY ENERGY CORPORATION,
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

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1. The court below upheld a system under which Petitioners' property was taxed at a level as much as 6,500 percent higher than the level of property found by the trial court to be comparable.[1] This startling disparity was not based on any subjective valuation judgment, since the assessor expressly did not consider the respective characteristics of the properties in appraising them for tax purposes. Respondent County Commission concedes the point, *see* Resp. Br. at 2-3, the Circuit Court so found, Pet. App. 29a, 59a, and the Supreme Court of Appeals did not disturb those findings on appeal. *See* Pet. App. 6a. Nor was the disparity based on any classi-

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[1] The statement required by Rule 28.1 appears at Pet. App. 105a.

fication of property under state law, since it is undisputed that Petitioners' property and the comparable parcels were classified the same under state law for tax purposes. *See* Pet. at 16 n.7.

2. Respondent, citing testimony before the County Commission, bases its opposition to certiorari on the new argument that Petitioners' property was not comparable to other coal property in Webster County. *See* Resp. Br. at 12 & App. A. But it is far too late in the day to reargue the facts. Respondent contends that the list of comparable properties relied upon by the Circuit Court below to show the patent discrimination "was a *mere compilation* of the values on the land books *without regard* to the *location, topography, accessibility or other factors* that may affect market value." Resp. Br. at 13 (emphasis in original). What the Circuit Court found, and what was undisturbed on appeal, was that the other properties *were* comparable "in topography, location, access, development, mineral content and forestation." Pet. App. 16a.

Respondent argues—contrary to fact—that some difference between Petitioners' property and other coal property in Webster County can explain the disparity of 6,500 percent in appraisal. Again, the findings of fact below, undisturbed on appeal, could not be more explicit in refuting any such contention:

> The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon the [comparable] properties.
>
> The questioned assessments were not based upon present use or immediately foreseeable economic development of petitioners' real estate. The assessor did not consider the size, shape, locations, access, or availability of public highways, sewers, water, gas or electricity in assessing either the petitioners' real

> estate or the real estate listed in the Exhibit B or G comparables. [Pet. App. 29a; *see* Pet. App. 59a.]

Indeed, while Respondent now argues that Petitioners' property is distinguishable from the other coal property in Webster County, the assessor below eschewed any such contention: "Upon examination, the assessor did not contend that petitioners' assessment was the result of unique or valuable features peculiar only to petitioners' land." Pet. App. 30a, 59a. In fact, Respondent itself *stipulated* below to the admission of the list of comparable properties. *See* Pet. App. 21a, 24a, 29a, 90a.

In any event, there is nothing in the testimony before the Commission—which was of course available to the Circuit Court when it found the other properties comparable to Petitioners' property in every pertinent respect—that undermines the validity of the comparison of the tax assessments. The expert witness Mullenex expressly stated that the properties were comparable geologically, Resp. Br. App. 6a, 9a, and that the "same coal seams" on Petitioner's property "are present on all the other properties." *Id.* at 10a. Respondent cannot escape the undisturbed finding that the properties were comparable, and cannot escape the glaring discriminatory taxation shown on the undisputed record.[2]

3. With respect to the law, Respondent relies most heavily on a 1984 decision of the court below. The divided decision in *Kline* v. *McCloud*, 326 S.E.2d 715 (W. Va. 1984), at most shows that the decision below was no fluke, and that the position of the court below is firmly established. As noted in the Petition, Pet. at 18-21, 23-25, that firmly established position conflicts not only

---

[2] Respondent states that the court below "found" that the assessor raised the assessment of unsold property by ten percent in certain years. Resp. Br. at 13. The court made no such finding, as is clear from the page cited by Respondent, Pet. App. 6a. And in fact the assessor made only occasional *de minimis* adjustments in the assessments of unsold property. Pet. App. 27a-28a, 58a. In any event, the record of overwhelming disparity in taxation already took into account any such increases. *See* Pet. App. 20a, 22a.

with decisions of this Court, but with decisions of other federal courts and state courts of last resort.[3]

Respondent also relies upon three decisions of this Court: *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517 (1933); *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522 (1959); and *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). None of these cases is pertinent. Each considered the reasonableness of classification of property under state law for tax purposes: *Liggett* between local and chain stores, *Allied Stores* between warehoused merchandise owned by residents and that owned by nonresidents, and *Lehnhausen* between corporations and individuals. As noted, no such issue is presented in this case. West Virginia law draws *no* distinction for tax purposes between Petitioners' property and the property found below to be comparable. Indeed, state law mandates that the properties be treated the same for tax purposes—appraised and assessed on the same basis, and taxed at the same rate. *See* W. Va. Const. art. 10, § 1; W. Va. Code 11-3-1. Yet Petitioners' property, because of the discriminatory appraisal system, was taxed at a level 6,500 percent higher than other property. That disparity was based on discrimination, not classification.

4. Respondent's opposition frames the second question presented by Petitioners in stark form:

> [T]he respondents do agree that it is the settled law of the State of West Virginia that if a taxpayers property is assessed at market value, if the taxpayer believes that other property is not assessed at market value, his remedy is to compel the other

---

[3] Curiously, Respondent seems to suggest that the ultimate vote below was 4-1 rather than 3-2. *See* Resp. Br. at 5. Justice Neely, who dissented in *Kline*—the case on which Respondent relies—also joined Justice Brotherton when he filed his dissent below. Pet. App. 11a. *See* Pet. at 10 & n.4; *Kline* v. *McCloud*, 326 S.E.2d at 725-727 (Neely, C.J., dissenting).

> assessments to be raised and he is not entitled to have it lowered. [Resp. Br. at 14.]

The contrast with what this Court has repeatedly held could not be clearer. *See, e.g., Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931) ("it is well settled that a taxpayer who has been subjected to discriminatory taxation * * * cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid"); *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946) ("The constitutional requirement * * * is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class").

Contrary to the Respondent's contention, *Liggett* does not support the court below. The taxpayer's claim there was that a few taxpayers were avoiding paying any tax, not that it paid taxes at a discriminatory level compared to all other taxpayers. 288 U.S. at 539. Indeed, the Court expressly reaffirmed the principles applicable to a case such as the present one: "[I]n the case of unequal and discriminatory assessment, to hold that the complaining taxpayer's only remedy is to have the assessments on all the other property raised to a level equal with that of his own is in effect to deny any remedy whatever." *Id.* at 540.

5. Respondent acknowledges that the appraisal approach that resulted in the dramatic disparity shown on the record was the consistent "policy" of the assessor. Resp. Br. at 2. Respondent also confirms that the only remedy for Petitioners is to seek to raise the assessments of all other property. *Id.* at 14. Finally, Respondent does not dispute that the questions presented are important and recurring. *See* Pet. at 25-27. Respondent's Brief in Opposition amply confirms the pressing need for review by this Court.

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision of the court below.

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Supreme Court, U.S.
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Nos. 87-1303, 87-1310

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,
v.
COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA,
Respondent.

EAST KENTUCKY ENERGY CORPORATION, ONEIDA COAL COMPANY, INC., and SHAMROCK COAL COMPANY, INC.
Petitioners,
v.
COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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JOINT APPENDIX

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CERTIORARI GRANTED MARCH 28, 1988

2:4 PM

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Judgment of West Virginia Supreme Court Of Appeals ..... Pet. App. 12a

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Orders of the Webster County Commission, sitting as a Board of Equalization and Review ..... AP Pet. App. 58a-69a; EKE Pet. App. 90a-104a

WEBSTER COUNTY CIRCUIT COURT

Case No. 2532

ALLEGHENY PITTSBURGH COAL COMPANY

vs.

WEBSTER COUNTY COURT

DOCKET ENTRIES

DATE	PROCEEDINGS
3-23-	Petition filed
3-23-76	Notice filed
3-23-76	Exhibits filed
3-23-76	Summons & complaint served on W.W. Talbott
4-9-84	Notice & Motion filed
5-18-84	Order
5-25-84	Order
12-5-85	Notice & Motion to Reconsider Judgment Order
12-5-85	Notice & Motion filed
2-20-86	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 78-C-33

ALLEGHENY-PITTSBURGH COAL COMPANY, a corp.,
Plaintiff

vs.

WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-22	Notice filed
3-22	Order filed
3-22	Notice to Prosecuting attorney filed
3-22	Petition for Appeal
3-27	Notice
4-9-84	Notice & Motion filed
5-18-83	Order
5-25-84	Order
11-22-85	Order
12-5-85	Notice & Motion to Reconsider Judgment Order
12-5-85	Notice & Motion
2-13-86	Report of Assessor for Webster Co.
2-20-86	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 79-C-38

ALLEGHENY PITTSBURGH COAL COMPANY,
Plaintiff

vs.

THE WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
4-3	Petition filed
4-3	Notices filed
4-9-84	Notice & Motion filed
5-18-84	Order
5-25-84	Order
11-22-85	Order
12-5-85	Notice & Motion
12-5-85	Notice & Motion to Reconsider Judgment Order
2-20-86	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 80-C-59

ALLEGHENY-PITTSBURGH COAL COMPANY,
Plaintiff

vs.

WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
7-17	Petition for Appeal filed
7-17	Notice to Prosecuting Attorney
4-9-84	Notice & Motion filed
5-18-84	Order
5-25-84	Order
11-22-85	Order
12-5-85	Notice & Motion to Reconsider Judgment Order
12-5-85	Notice & Motion
12-18-85	Order to Prepare Transcript
12-28-85	Deposition
2-13-86	Report of Assessor for Webster County
2-20-86	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 81-C-39

ALLEGHENY PITTSBURGH COAL COMPANY, a corporation,
Plaintiff

vs.

THE WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-20	Petition Filed
3-20	Notice to Prosecuting Attorney Filed
3-20	Exhibits Filed
3-30	Notice Filed
4-9-84	Notice & Motion filed
5-18-84	Order
5-25-84	Order
11-22-85	Order
12-5-85	Notice & Motion
12-5-85	Notice & Motion to Reconsider Judgment Order
12-18-85	Order to Prepare Transcript
12-31-85	Deposition
2-20-86	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 81-C-42

SHAMROCK COAL COMPANY, INC., A Corp.,
Plaintiff

vs.

WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-27	Petition filed
3-27	Notice filed
3-27	Order filed
4-13	Notice Filed
5-18	Order
6-1	Opening Brief on Behalf of Petitioner Shamrock Coal Company, Inc.
2-19	Reply Brief on Behalf of Respondent, Webster County Commission, sitting as the Board of Equalization and Review
5-18-84	Order
2-13-86	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 82-M-18

IN RE: ONEIDA COAL COMPANY, INC.,
Plaintiff

vs.

WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-12	Petition filed
3-12	Notice filed
3-12	Order
3-12	Three copies to W.T. Weber petition, Notice & Order
3-12	Order
5-7	Order
5-18-84	Order
5-25-84	Order
2-13-86	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 82-MISC-26

IN RE: TAX ASSESSMENTS AGAINST
ALLEGHENY-PITTSBURGH COAL COMPANY,
Plaintiff

VS.

WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
4-5	Petition for Appeal filed
4-5	Notice & County Commissioners Certificate filed
4-16	Notice
2-15	Order of County Commission
1-24-84	Order
4-9-84	Notice & Motion filed
5-18-84	Order
5-25-84	Order
11-22-85	Order
12-5-85	Notice & Motion to Reconsider Judgment Order
12-5-85	Notice & Motion
12-20-85	Depositions
12-18-85	Order to Prepare Transcript
2-13-86	Report of Assessor for Webster Co.
2-20-86	Order
12-19-86	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 83-MSC-10

WEBSTER COUNTY COMMISSION,
Plaintiff

vs.

ONEIDA COAL COMPANY, INC., a corporation,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-4-83	Upon Petition for Review and Equalization of Assessment of Coal Property
3-4-83	Order
3-4-83	Notice
3-4-83	Exhibits
3-4-83	Petition for Appeal and Relief from Assessment of Coal Lands
3-24-83	Notice
5-18-84	Order
2-13-86	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 84-MSC-8

IN RE: TAX ASSESSMENT, 1983, AGAINST
ALLEGHENY PITTSBURGH COAL COMPANY,
Plaintiff

VS.

WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-7-84	Petition for Appeal filed
3-7-84	Notice filed
3-7-84	Order
3-14-84	Notice filed
4-11-84	Memorandum of Law
5-18-84	Order
6-29-84	Statement of Facts
7-19-84	Reply Memorandum filed
9-20-84	Petition filed
9-24-84	Response of the Webster County Commission to Petition
10-2-85	Petition filed
10-28-85	Bond
11-22-85	Order
12-2-85	Motion & Notice filed

DATE	PROCEEDINGS
12-5-85	Notice & Response to Motion
12-5-85	Notice & Motion to Stay Further Proceedings
12-5-85	Notice & Motion to Reconsider Judgment Order
12-5-85	Notice & Motion
12-11-85	Response to the Many Motions made by Respondent in the above
12-13-85	Order
12-13-85	Order
12-18-85	Order to Prepare Transcript
12-20-85	Deposition
12-31-85	Response of East Kentucky Energy Corp.
12-27-85	Motion & Notice filed
2-5-86	Response of Taxpayer to Report of the Assessor filed November 22, 1985
2-13-86	Report of Assessor for Webster Co.
2-20-86	Order
12-19-86	Order
11-17-87	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 84-MSC-9

IN RE: TAX ASSESSMENT, AGAINST
EAST KENTUCKY ENERGY CORPORATION, a corporation,
Plaintiff

vs.

WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-7-84	Petition for Appeal filed
3-7-84	Notice filed
3-7-84	Order
3-14-84	Notice filed
4-11-84	Memorandum of Law
5-18-84	Order
6-29-84	Statement of Facts
7-19-84	Reply Memorandum filed
9-20-84	Petition
9-24-84	Response of the Webster County Commission to Petition
11-1-84	Order
2-5-85	Copy of file
10-2-85	Petition filed
10-28-85	Bond

DATE	PROCEEDINGS
10-30-85	Restraining Order
11-22-85	Order
12-2-85	Motion & Notice filed
12-5-85	Notice & Motion filed
12-5-85	Notice & Motion to Reconsider Judgment Order
12-5-85	Notice & Motion to Stay Further Proceedings
12-5-85	Notice & Response to Motion
12-11-85	Response to the Many Motions Made by Respondent in the Above
12-13-85	Order
12-13-85	Order
12-18-85	Order to Prepare Transcript
12-20-85	Deposition
12-31-85	Response of East Kentucky Energy Corp.
12-27-85	Motion & Notice filed
2-5-86	Response of Taxpayer
2-13-86	Report of Assessor for Webster Co.
2-20-86	Order
12-19-86	Order
11-17-87	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 84-MSC-10

IN RE: ONEIDA COAL COMPANY, INC.
A Corp., TAX ASSESSMENT,
Plaintiff

vs.

WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-7-84	Petition for Appeal and Relief from Assessment
3-7-84	Notice filed
3-7-84	Order
3-14-84	Notice filed
5-18-84	Order
5-22-84	Order
2-13-86	Order
12-19-86	Order
11-17-87	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 85-MSC-19

IN RE ONEIDA COAL COMPANY, INC.
A CORP., TAX ASSESSMENT,
Plaintiff

VS.

WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-8-85	Order Filing Petition
3-8-85	Petition for Appeal and Relief from Assessment
3-21-85	Notice filed
4-19-85	Order
6-26-85	Transcript of Hearing
2-13-86	Order
12-19-86	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 85-MSC-20

IN RE EAST KENTUCKY ENERGY CORPORATION,
Plaintiff

vs.

WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-12-85	Petition for Appeal
3-12-85	Notice filed
3-21-85	Notice filed
6-26-85	Transcript of Hearing
10-2-85	Petition filed
11-30-85	Restraining Order
11-22-85	Order
12-2-85	Motion & Notice filed
12-5-85	Notice & Motion
12-5-85	Notice & Motion to Reconsider Judgment Order
12-5-85	Notice & Response to Motion
12-5-85	Notice & motion to Stay Further Proceedings
12-11-85	Response to the Many Motions Made by Respondent in the Above
12-13-85	Order
12-13-85	Order

DATE	PROCEEDINGS
12-18-85	Order to Prepare Transcript
12-28-85	Deposition
12-31-85	Response of East Kentucky Energy Corp.
12-27-85	Motion & Notice filed
2-5-86	Response of Taxpayer
2-13-86	Report of Assessor for Webster Co.
2-20-86	Order
12-19-86	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 86-MSC-17

IN RE EAST KENTUCKY ENERGY CORP.,
1986 TAX ASSESSMENT,
Plaintiff

VS.

WEBSTER COUNTY COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-10-86	Petition for Appeal
3-10-86	Notice filed
3-21-86	Order
12-19-86	Order
11-17-87	Order

WEBSTER COUNTY CIRCUIT COURT

Case No. 86-MSC-18

IN RE ONEIDA COAL COMPANY, INC.,
A Corporation,
Plaintiff

vs.

WEBSTER CO. COMMISSION,
Defendant

DOCKET ENTRIES

DATE	PROCEEDINGS
3-10-86	Petition for Appeal and Relief from Assessment
3-10-86	Notice filed
3-10-86	Order Filing Petition
3-21-86	Order
10-7-86	Order (Supreme Court)
12-19-86	Order
11-17-87	Order

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 17315

IN RE 1975 TAX ASSESSMENTS
AGAINST ONEIDA COAL CO., *et al.*

RELEVANT DOCKET ENTRIES

Date	Item
July 25, 1986	Commission petition for writ of error and supersedeas
Sept. 11, 1986	Commission petition for appeal
Sept. 17, 1986	Order granting petition
Sept. 30, 1986	Order granting motion for leave to reverse, case to be heard upon original record, briefs, and motion to reverse
Oct. 31, 1986	Commission brief
Nov. 26, 1986	Order granting motion to dismiss Pardee & Curtin Lumber Co. and Sun Lumber Co.
Dec. 1, 1986	Appellees' brief
Jan. 14, 1987	Order noting submission on argument docket
July 17, 1987	Judgment order
Aug. 13, 1987	Appellees' petition for rehearing
Aug. 31, 1987	Order suspending mandate pursuant to petition for rehearing
Sept. 18, 1987	Dissenting opinion
Nov. 10, 1987	Order denying petition for rehearing and entering mandate

Date	Item
Nov. 12, 1987	Appellees' motion to suspend judgment
Nov. 17, 1987	Commission response to motion to suspend judgment
Nov. 17, 1987	Order suspending execution of judgment

Supreme Court, U.S.
FILED
MAY 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1303, 87-1310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
WEST VIRGINIA,
Respondent.

EAST KENTUCKY ENERGY CORPORATION,
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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QUESTIONS PRESENTED

1. Did the great disparities in real property assessment established on the record below, which resulted from a West Virginia county's policy of relying exclusively on recent sales prices in arriving at the value of property—without adjusting the assessment of unsold comparable properties to reflect current value—violate petitioners' rights under the Equal Protection Clause?

2. Did the court below err in denying taxpayers subject to this discriminatory treatment any reduction in the assessment of their property, on the ground that they should instead seek to raise the assessments of all other comparable properties in the county, contrary to the holdings of this Court in *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946), *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), and other cases?

PARTIES TO THE PROCEEDINGS

Petitioner in No. 87-1303 is Allegheny Pittsburgh Coal Company ("Allegheny Pittsburgh"). Petitioners in No. 87-1310 are East Kentucky Energy Corporation ("East Kentucky Energy"), Oneida Coal Company, Inc. ("Oneida"), and Shamrock Coal Company, Inc. ("Shamrock"). Petitioners were appellees before the West Virginia Supreme Court of Appeals and petitioners before the Webster County Circuit Court. Pursuant to Supreme Court Rule 28.1, a list of parents, subsidiaries, and affiliates of petitioners appears at page ii of the petition for certiorari in No. 87-1303 and at Appendix J of the petition for certiorari in No. 87-1310.

Respondent County Commission of Webster County, West Virginia, is the official entity that confirmed the challenged assessments of petitioners' property.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 87-1303, 87-1310

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
WEST VIRGINIA,
Respondent.

EAST KENTUCKY ENERGY CORPORATION,
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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JOINT BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at —— W. Va. ——, 360 S.E.2d 560, and is reprinted in the appendix to the petitions for certiorari ("Pet. App.") at 1a.[1] The pertinent orders

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[1] This Court has consolidated Nos. 87-1303 and 87-1310. The appendices to the separate petitions for certiorari reproduce in identical fashion most of the orders and opinions below. Thus, a

and opinions of the Circuit Court of Webster County (Cline, J.), consolidated for purposes of appeal, are unreported and are reprinted at AP Pet. App. 15a-57a and EKE Pet. App. 15a-89a. The orders of the County Commission of Webster County, sitting as a Board of Equalization and Review, are unreported and are reprinted at AP Pet. App. 58a-69a and EKE Pet. App. 90a-104a.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered on July 17, 1987. Pet. App. 12a. That court entered an order denying a timely-filed petition for rehearing on November 10, 1987. Pet. App. 14a. The petition for certiorari was filed in No. 87-1303 on February 4, 1988, and in No. 87-1310 on February 5, 1988. This Court granted the petitions and consolidated the cases on March 28, 1988. 108 S. Ct. 1268-69. The jurisdiction of this Court to review the judgment below rests on 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4.

The provisions of the Constitution of West Virginia and the West Virginia Code involved in this case are: W. Va. Const. art. X, §§ 1 & 1b; W. Va. Code §§ 11-3-1

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reference to "Pet. App." may be found at the same page in the appendix to either petition. Where an order or other matter is reproduced in only one of those appendices, the reference to the appendix to the petition in No. 87-1303 will appear as "AP Pet. App." and to the appendix to the petition in No. 87-1310 as "EKE Pet. App."

& 11-3-25; and W. Va. Code § 18-9A-11. These provisions are set forth at AP Pet. App. 70a-87a.

STATEMENT OF THE CASE

Since 1976 petitioners have pursued relief before the County Commission of Webster County, West Virginia, and in the courts of that state, seeking to remedy a pattern of blatant discrimination in the methods of real property appraisal and assessment employed by the Webster County Assessor. Finally, in December 1985 and February 1986, the Circuit Court for Webster County issued opinions and orders finding that the Webster County Assessor had for years violated the dictates of the state and federal constitutions in her methods of appraising real property, resulting in petitioners having been required to pay a wildly disproportionate share of the County's property tax burden. The Circuit Court ordered that the appraisals and assessments on petitioners' property be reduced and substantial refunds paid.

The County Commission appealed the Circuit Court's rulings. By a three-to-two margin, the West Virginia Supreme Court of Appeals reversed, holding that the system of property tax assessment employed by the Webster County Assessor did not violate the West Virginia Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Webster County's System Of Property Tax Assessment

This case concerns an *ad valorem* tax on the ownership of real property. Since the amount of this tax is based on the value of property, it is necessary to ascertain the value of the different parcels of property subject to the tax. Once this appraisal process is complete and the appraised value of a particular parcel is established, an appropriate percentage is applied to arrive at the "assessed value." The tax is then levied as a percentage of the assessed value of the property.

West Virginia statutes and constitutional provisions outline a detailed scheme for the appraisal and assessment of real property for purposes of local taxation. *See* AP Pet. App. 70a-87a. Taxes are levied based on a uniform assessment percentage of the "true and actual value" of property. W. Va. Const. art. X, § 1b, W. Va. Code § 11-3-1. During most of the years at issue in this case, the Webster County Assessor assessed all real property within the County at 50 percent of its appraised value.[2] The questions presented here involve the constitutionality of the method by which the Assessor arrived at the appraised values of properties within the County. There is no issue in this case concerning discriminatory tax levies or the application of discriminatory assessment percentages. The unconstitutional discrimination found by the Circuit Court and the two dissenters in the West Virginia Supreme Court of Appeals resides in the initial determination of the value of the property.

To assist county assessors in making that determination, the State Tax Commissioner of West Virginia periodically publishes a state-wide appraisal for use in evaluating all classes of property. By statutory command, this appraisal is to be "delivered to the assessor and county commission [of each county]," and those local officials "shall use such appraised valuations as a basis for determining the true and actual value for assessment purposes of the several classes of property." W. Va. Code § 18-9A-11(f). During the years in question, the State Tax Commissioner determined a baseline appraised value for petitioners' property in Webster County to be $360 per acre, yielding an assessed value of $180 per acre. *See* Pet. App. 46a.

Contrary to West Virginia law, the Webster County Assessor *never used* the State Tax Commissioner's guide.

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[2] Today, all property in the State is assessed at 60 percent of its appraised value. W. Va. Const. art. X, § 1b.

The County Commission, sitting as a Board of Equalization and Review, never used that document either. Instead, the Circuit Court found that the Webster County Assessor, after receipt of the state-wide appraisal, "placed [it] in a drawer where it remained unused and abandoned until the day of the hearing" before the Circuit Court. Pet. App. 34a.

The alternative system adopted as policy by the Webster County Assessor, and approved over the years by the County Commission, was quite simple: "all recently transferred property was uniformly and equally assessed at fifty per cent (now sixty) of the value declared in the most recent deed of conveyance to a taxpayer." Pet. App. 27a. So long as the property was not subject to recent sale, it was carried on the tax rolls with the same assessment it had borne in prior years, with only occasional *de minimis* adjustments. Pet. App. 6a, 27a-28a; EKE Pet. App. 58a. As a result of this assessment system, recently-conveyed property was assessed on the basis of its actual current value, while other comparable property was assessed, and therefore taxed, at a much lower level.

The Challenged Assessments

In 1974 Allegheny Pittsburgh purchased some 7300 acres of Webster County coal property. The purchase price for this property was $24,624,500. Pet. App. 3a. In 1975 this property was assessed at a little less than $500,000. Effective in 1976, however, when the Assessor first took into account the conveyance to Allegheny Pittsburgh, the assessment was raised to $12,312,250, or precisely 50 percent of the purchase price reflected in the deeds. This assessment of nearly $1,700 per acre created a one-year increase in Allegheny Pittsburgh's property taxes of over 2,500 percent. Despite filing repeated petitions for relief with the County Commission, Allegheny Pittsburgh's property remained assessed at this level for each tax year between 1976 and 1983.

In July 1982, Allegheny Pittsburgh sold its Webster County property to East Kentucky Energy for a purchase price of $29,842,500. In 1984, the Webster County Assessor first took note of this sale, and raised the assessment on the property to 50 percent of the purchase price —$14,921,250—or a little over $2,000 per acre. Pet. App. 3a. For the years 1984 through 1986, East Kentucky Energy protested this assessment to the County Commission, to no avail.

In 1977, Shamrock purchased 7,783 acres of Webster County coal land, as part of a larger transaction in which it purchased coal property, coal leases and options located in Nicholas County, Braxton County, and Webster County. The total purchase price for all the land, leases and options was $10,000,000. The Webster County Assessor appraised the Webster County portion of the property purchased by Shamrock at $5,867,600, based on the ratio of the Webster County acreage to the total acreage Shamrock purchased. In 1981, Shamrock conveyed the property to Oneida, a sister corporation, without cash consideration. For all years between 1981 and 1986 the Shamrock-Oneida property was assessed at $2,933,800, or 50 percent of the County Assessor's calculation of the deed value. EKE Pet. App. 52a-54a. Shamrock and Oneida objected to this assessment, but the County Commission denied all relief.

If the Webster County Assessor had utilized the State Tax Commissioner's Guide, the assessed value of petitioners' properties would have been $180 per acre. Instead, Allegheny Pittsburgh paid property taxes for the years 1976 through 1982 on an average assessment of $1,688.64 per acre; East Kentucky Energy was assessed at the same rate in 1983 and, beginning in 1984, at an average rate of $2,043 per acre; and Shamrock and Oneida were taxed during the years 1981 through 1986 on an average assessment of $376.95 per acre. As became clear during the course of petitioners' challenges, however, this deviation

from the state-wide appraisal was only the beginning of the story, since other comparable property in Webster County was appraised and assessed at levels far *below* those set in the State Tax Commissioner's Guide.

The Circuit Court's Rulings

All of the petitioner taxpayers filed protests with the County Commission of Webster County, which sat as a Board of Equalization and Review, *see* W. Va. Code § 11-3-25, contending that the assessments on their property were unconstitutional and discriminatory. They specifically claimed, for example, that the County Assessor "employed a systematic plan of assessing property whereby [petitioners'] assessments have been greatly increased and other property owners in the same class in the same location are intentionally omitted [from such increases]."[3] Consistently, over a period of ten years, the County Commission refused to grant petitioners any relief. *See* AP Pet. App. 58a-69a; EKE Pet. App. 90a-104a.

Each year petitioners filed appeals with the Circuit Court for Webster County, seeking review of the County Commission's decisions. All appeals for the years 1976 through 1985 on the Allegheny Pittsburgh-East Kentucky Energy property eventually were consolidated by Circuit Court Judge Danny O. Cline and decided in an Order entered on November 22, 1985. Pet. App. 15a. The appeals of Shamrock and Oneida, based on 1981 through 1985 assessments, were consolidated and decided by Judge Cline on February 13, 1986. EKE Pet. App. 49a. Judge Cline held that the system of real property assessment used by the Webster County Assessor systematically and intentionally discriminated against petitioners in violation of both the West Virginia Constitution and the Fourteenth Amendment's Equal Protection Clause. He

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[3] Allegheny Pittsburgh Application to Webster County Commission for 1976, at 2.

ordered the County Commission to reduce the assessments on petitioners' properties to the levels set by the State Tax Commissioner. Pet. App. 43a, 46a-47a; EKE Pet. App. 74a-75a, 78a.[4]

Judge Cline based his holding of unconstitutional discrimination on a detailed examination of the record created in years of proceedings before the County Commission. Central to his holding was a comparison of the assessments on petitioners' property with the assessments on neighboring parcels of coal property that he found to be comparable in all respects. *See* Pet. App. 21a-22a. The Circuit Court specifically found that "petitioners' real estate is substantially similar to the real estate of the others in topography, location, access, development, mineral content and forestation, and that the petitioners' real estate is substantially similar to adjacent and contiguous tracts and parcels of real estate owned by others." Pet. App. 16a; *see* EKE Pet. App. 50a. The court concluded that "it is obvious that the real estate of the petitioners and that of contiguous, adjoining and adjacent landholders to which it is compared is substantially the same." Pet. App. 29a.[5]

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[4] This reduction in assessments entitled petitioner Allegheny Pittsburgh to a tax refund, exclusive of interest, totalling over $1.2 million. Oneida-Shamrock is entitled to a similar refund of some $100,000. East Kentucky Energy, pursuant to interim Circuit Court orders, paid taxes based on the assessments in the State Tax Commissioner's Guide, and thus no refunds were necessary for it. In subsequent orders, Judge Cline made his rulings applicable to the 1986 assessments on the East Kentucky Energy and Oneida property. EKE Pet. App. 83a-89a.

[5] Respondent stipulated below to the admission of lists of comparable properties. *See* Pet. App. 21a, 24a, 29a; EKE Pet. App. 90a. In particular, respondent stipulated that "[t]he properties surrounding the property owned by [East Kentucky Energy], located on Exhibit A and listed on Exhibit B are comparable properties in that they are substantially the same geologically as the properties of [East Kentucky Energy], the subject matter of this action." Stipulation (Feb. 10, 1984), at ¶ 6; Stipulation (Feb. 15, 1984), at ¶ 10.

In the case of the Allegheny Pittsburgh-East Kentucky Energy properties, Judge Cline found that the property had been assessed on an average per acre basis of $35.88 in 1975, but was raised to an average assessment of $1,688.64 per acre in 1976, and was increased again to $2,043 per acre in 1984. By contrast, nine comparable properties (identified in Trial Exhibit B) were assessed at an average rate per acre of $27.38 in 1975, $48.15 in 1976, and $62.15 in 1984. Pet. App. 24a. Fifty additional parcels (identified in Trial Exhibit G) that the court found to be "substantially similar to petitioner's real estate" had been assessed at an average rate per acre of $27.95 in 1975, $53.20 in 1982, and $58.31 in 1984. Pet. App. 24a-25a. Thus, for the years 1976 through 1982, Allegheny Pittsburgh was assessed and taxed at approximately 35 times the rate applied to owners of comparable properties. For the years 1984 through 1986, East Kentucky Energy was assessed and taxed at approximately 33 times the rate applied to owners of comparable properties.[6]

Comparing the respective increases in assessment of the Allegheny Pittsburgh-East Kentucky Energy property and the comparables, the Circuit Court concluded that

> the evidence presented clearly and convincingly establishes that the assessor, and the Board of Equalization and Review, in sustaining the questioned assessments, have, over a period of ten years, systematically and intentionally assessed the petitioners' real estate, and consequently levied taxes against petitioners' real estate, at a weighted rate per acre of from 5,672.56 to 6,511.06 percent in excess of the weighted rate per acre assessment applied to com-

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[6] These ratios are based on the assessed values of petitioners' property in 1976 and 1984, as compared to the average assessed values of the Exhibit B comparables in those years. If one uses the larger sample of properties contained in Exhibit G, the ratios are 32 to 1 for Allegheny Pittsburgh and 35 to 1 for East Kentucky Energy.

> parable real estate owned by others and located adjacent, contiguous or near that of petitioners. [Pet. App. 40a.]

The facts found by the Circuit Court with respect to the Oneida-Shamrock properties were less dramatic, but the evidence of discriminatory assessment was no less compelling. The Oneida-Shamrock properties were assessed at an average rate of $376.95 per acre for the years 1981 through 1985. The court examined several representative 1983 assessments of coal property located in the same magisterial districts of the County, and found that all those assessments were at much lower levels. Those 1983 assessments, which the Court found to be "generally indicative of the assessment of Webster County coal tracts during the period in question," were at levels of $21.99 per acre, $48.55 per acre, $19.21 per acre, $22.00 per acre, $24.20 per acre, $21.98 per acre, and $22.00 per acre. *See* EKE Pet. App. 60a-61a. Based on these figures, Shamrock and Oneida were assessed and taxed at a rate of from 8 to 20 times the rate applied to owners of comparable neighboring coal properties.[7]

The Circuit Court specifically determined that these arresting disparities between the assessments of petitioners' property and those of comparable properties owned by others could *not* be traced to any distinguishing characteristics or unique features of petitioners' property:

> The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon the [comparable] properties.

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[7] The 20 to 1 ratio is based on the 1983 assessment of a 1,000 acre tract at $19.21 per acre. The 8 to 1 ratio is based on the 1983 assessment of an 8,500 acre tract at $48.55 per acre. *See* EKE Pet. App. 60a.

> The questioned assessments were not based upon present use or immediately foreseeable economic development of petitioners' real estate. The assessor did not consider the size, shape, location, access, or availability of public highways, sewers, water, gas or electricity in assessing either the petitioners' real estate or the real estate listed in the Exhibit B or G comparables. [Pet. App. 29a; *see* EKE Pet. App. 59a.]

No distinguishing characteristics could explain the disparity in assessments because "the assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." Pet. App. 29a; EKE Pet. App. 59a. As the Circuit Court noted, "[u]pon examination, the assessor did not contend that petitioners' assessment was the result of unique or valuable features peculiar only to petitioners' land." Pet. App. 30a; EKE Pet. App. 59a. On the contrary, it was undisputed below that "[t]he sole basis for the assessment of petitioners' real estate was, according to the assessor, the consideration declared in petitioners' deeds." Pet. App. 29a; EKE Pet. App. 59a.

To be sure, the Circuit Court recognized that there was nothing inherently wrong with an assessor's use of recent sales data as the basis for appraising real property. But the court held that the Webster County Assessor's failure to use recent sales data to determine the current market value of all property—including property that had *not* been recently conveyed—led to a discriminatory and unconstitutional result:

> [I]f the assessor elects to use recent sales as the basis for the assessment of real estate, he is obligated by the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal and uniform clause of Section 1, Article X, of the West Virginia Constitution to base the real estate assessments of substantially similar real

> estate, whether owned by a corporation or an individual, upon the same or a similar value, depending on certain variables, even though the real estate has not been the subject of a recent conveyance. [Pet. App. 42a; *see* EKE Pet. App. 74a.]

The County Assessor's method of assessing *only* properties recently conveyed at their current market value was, according to the Circuit Court, applied "intentionally and systematically." Pet. App. 42a-43a; EKE Pet. App. 74a. Moreover, the County Commission, sitting as a Board of Equalization and Review, had intentionally failed to correct the Assessor's discriminatory practices:

> The evidence further shows, and the Court so finds, that the inequality of the assessment of petitioners' real estate and that of comparable tracts has been repeatedly brought to the attention of the assessor and the Board of Equalization and Review over the ten year period involved.
>
> The evidence also demonstrates, and the Court finds, that as petitioners have repeatedly and consistently protested the inequality of the assessment of their real estate, as compared to the assessments of comparable real estate owned by others, the assessor and Board of Equalization and Review, have just as consistently and repeatedly refused to equalize petitioners[']assessment downward or to equalize the real estate assessments of others upward, though petitioners[] have requested relief in both directions. [Pet. App. 40a-41a; *see* EKE Pet. App. 72a-73a.]

The Circuit Court chose to reduce the disparity in assessments by lowering the assessed values of petitioners' property to an average of $180 per acre (50 percent of the appraised value set by the State Tax Commissioner's Guide).[8] The court considered but rejected the alterna-

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[8] The Circuit Court rejected out of hand the County Commission's argument that, over time, the assessments would be equalized

tive remedy of increasing the assessments on neighboring properties to the levels set by the Assessor for petitioners' property, noting that the extraordinary adverse financial impact on neighboring landowners would have been too severe for many of them to bear. *See* Pet. App. 43a-44a; EKE Pet. App. 75a-76a.

The Decision Below

The County Commission appealed the Circuit Court's orders to the West Virginia Supreme Court of Appeals. The appeals were consolidated, and the Supreme Court of Appeals reversed the Circuit Court's judgment by a narrow margin of three to two.[9]

The unsigned per curiam opinion of the majority concluded that the consideration recited in petitioners' deeds reflected the true and actual value of their property, that the undervaluation of neighboring properties in Webster County was not "intentional and systematic," and that the only remedy available to these taxpayers was to seek to have the County Commission raise the assessments of other taxpayers' property, rather than lower their own. *See* Pet. App. 7a-9a.

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by adjustments to the assessed values on county property not subject to recent sale. The court found that if the Assessor continued her pattern of occasional *de minimis* adjustments in unsold property and adjustments were *not* made to the assessments on petitioners' property, it would take *over 500 years* before comparable nearby properties were assessed at the 1984 rates applied to East Kentucky Energy's property. *See* Pet. App. 28a. If, on the other hand, "increased assessments [were] uniformly applied [to all county property] in the future[,] equalization would * * * never be accomplished. In fact, the difference between the assessments would become greater, not less." Pet. App. 28a. *See* EKE Pet. App. 58a.

[9] When the judgment of the court was announced on July 17, 1987, it indicated that only Justice Brotherton dissented. Pet. App. 13a. When Justice Brotherton's dissenting opinion was published on September 18, 1987, however, it stated that Justice Neely joined in the dissent. Pet. App. 11a.

The majority recognized that the issue was whether the "assessments violated the equal and uniform clause of * * * the West Virginia Constitution, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." Pet. App. 4a. The court first held that "the consideration paid by the [petitioners] represents the 'true and actual value' of their respective properties as set by the board of review." Pet. App. 7a. Then, citing the general rule that assessments are presumed to be correct, the court stated, without further elaboration, that "the record does not support the trial court's ruling that the actions of the assessor and board of review constitute 'intentional and systematic' discrimination." Pet. App. 8a. Finally, referring to two of its own prior decisions, the court held that if petitioners were aggrieved by the overassessment of their property in relation to comparable property owned by others, " 'they should seek to have the assessments of other taxpayers raised to market value.' " Pet. App. 9a (*quoting Killen* v. *Logan County Comm'n*, 295 S.E.2d 689, 709 (W. Va. 1982)).

The court reversed the judgments of the Circuit Court and remanded the case for reinstatement of the Assessor's original assessments on petitioners' property for all the years in question. Pet. App. 10a.

Justice Brotherton dissented, in an opinion joined by Justice Neely. *See* footnote 9 *supra*. The dissenters concluded that "the tail is now wagging the dog in West Virginia property taxation." Pet. App. 10a. The dissenters had no quarrel with the majority's holding that recent deed consideration is reliable evidence of a property's actual value, but argued that "the question of true value [cannot] override the *constitutional* requirement that taxation be equal and uniform." Pet. App. 10a (emphasis in original). Viewing the record evidence, the dissenters concluded:

> There is neither equality nor uniformity when recent purchasers of property must pay tax based on current value while all other property owners pay tax based on low, outdated assessed values. Where, as in this case, the assessor has made only token attempts to bring similar property up to current value, the assessor is intentionally and systematically undervaluing the other property in violation of Article X, § 1 of the West Virginia Constitution. [Pet. App. 10a.]

The dissenters recognized "the need for improving the educational system in West Virginia," [10] but argued that "this improvement cannot constitutionally be achieved at the expense of a few taxpayers." Pet. App. 10a.

There is no question that the judgment of the West Virginia Supreme Court of Appeals necessarily decided the federal questions presented by petitioners. The Circuit Court concluded that the discriminatory assessments of petitioners' property violated both the West Virginia Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Pet. App. 43a; EKE Pet. App. 74a ("the assessor and Board of Equalization and Review violated the equal and uniform clause of Section 1, Article X of the West Virginia Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution"). The West Virginia Supreme Court's reversal of the Circuit Court necessarily entailed a reversal of that court's holding based on the Fourteenth Amendment. Indeed, the Supreme Court opinion itself recognized that petitioners "argue that the primary issue presented by this case is whether the assessments of their property

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[10] Property taxes in West Virginia are used primarily for funding the public schools. *See* W. Va. Const. art. X, § 1b (Subsection E); Farber, *Limitations on Property Taxation in West Virginia: A Method Through the Madness*, 4 W. Va. Pub. Interest L. Rep. 1, 10 (1982).

and comparable properties are equal and uniform under the United States and West Virginia Constitutions." Pet. App. 5a.[11]

SUMMARY OF ARGUMENT

This Court has adopted a properly deferential standard in reviewing claims of discriminatory taxation, but no amount of deference or accommodation for questions of judgment can overlook the nature of the discrimination in this case or its startling magnitude. The property owned by petitioners was appraised—and therefore assessed and taxed—at a dramatically higher level than property owned by others that was comparable in every respect. The findings of the Circuit Court, undisturbed on appeal, established that the average assessed value of petitioners' property was as much as *35 times* the average assessed value of comparable property owned by others. Pet. App. 16a, 21a-25a.

This disparity did not result from errors in judgment, the exercise of discretion, or classification by the State among different types of property. It resulted from a discriminatory appraisal plan, deliberately adopted as policy by the Webster County Assessor, and sustained by the Webster County Commission.

The court below did not dispute the disparities established on the record, but concluded that the actions of the Assessor and County Commission were constitutionally acceptable because they did not constitute "intentional and systematic" discrimination. Pet. App. 8a. Although the court below did not explain this legal conclu-

[11] While both the majority and the dissent below articulated their reasoning with reference to the "equal and uniform" clause of the state constitution, W. Va. Const. art. X, § 1, the West Virginia Supreme Court has equated the requirements of that provision with those of the Fourteenth Amendment Equal Protection Clause, holding that both turn on the question whether discrimination in assessments is "intentional and systematic." *See Kline* v. *McCloud*, 326 S.E.2d 715, 724 (W. Va. 1984).

sion, it apparently ruled that petitioners were not subject to intentional and systematic discrimination because their property was not assessed at more than its actual value, and because they were free to seek to raise the assessments of any relatively undervalued properties owned by others. Pet. App. 7a-9a.

This Court has clearly held, however, that the fact that a given taxpayer's property is assessed at its actual value is no defense to an equal protection challenge to the lower assessment of comparable property. As Justice Brandeis noted for the Court in *Southern Railway* v. *Watts*, 260 U.S. 519, 526 (1923), "[t]he rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others." It is equally well established that a taxpayer who is subject to such discriminatory assessment cannot be relegated to attempting to raise the assessments of comparable properties owned by other taxpayers. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623-624 (1946); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 446 (1923). To quote Justice Brandeis again, writing for the Court, "a taxpayer who has been subjected to discriminatory taxation * * * cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. at 247.

This Court has also held that disparate taxation is "intentional and systematic"—and thus in violation of the Fourteenth Amendment—when clearly disparate assessments are "made pursuant to a deliberately adopted system," and result not from possible errors of judgment but from the system itself. *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23, 25 (1931). Here, there is no dispute that the disparate assessments were caused by

the Assessor's deliberate policy of reassessing recently purchased property at the purchase price, and not reassessing unsold comparable property to reflect current value.

The command of the Equal Protection Clause is that those who are similarly situated be treated similarly. There can be no question that petitioners and their neighbors in Webster County are similarly situated for purposes of *ad valorem* property taxation. West Virginia does not distinguish among types of property for purposes of appraisal and assessment, and the Circuit Court unambiguously found that petitioners' property was "substantially similar" to neighboring property "in topography, location, access, development, mineral content and forestation." Pet. App. 16a. Yet petitioners and their neighbors are *not* treated similarly for property tax purposes. Because of the appraisal policy deliberately adopted by the Assessor and County Commission, petitioners' property was appraised, assessed, and taxed at levels many times greater than that of comparable property owned by others. This discriminatory appraisal system favored the "friends and neighbors" of the elected county officials responsible for the policy, at the expense of newcomers like petitioners. Pet. App. 40a. The resulting dramatic discrimination should not be condoned by this Court.

ARGUMENT

I. The Record Establishes Discriminatory Taxation In Violation Of The Equal Protection Clause

This Court has long recognized that "the equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough* v. *Cromwell*, 326 U.S. at 623. Discriminatory treatment can inhere not only in disparate rates of taxation, but also in the disparate appraisal or assessment of comparable property subject to the same tax rate. Given two comparable parcels of property assessed at $1,000, taxing one at 5 percent, for a tax of $50, and the other at 10 percent, for a tax of $100, would clearly contravene the constitutional guarantee of equal treatment. The same result obtains, both as a practical and a constitutional matter, if a uniform 10 percent rate is applied to both parcels, but one is assessed for tax purposes at $500, yielding a tax of $50, while the other—comparable in every pertinent respect—is assessed at $1,000, yielding a tax of $100.

The discrimination in this hypothetical pales before the facts of this case. Because of the approach to property appraisal deliberately adopted as the policy of Webster County, petitioners' property was appraised, assessed, and taxed not at twice but up to *35 times* the level of other comparable property in the county. Under such circumstances, the fact that a uniform assessment percentage is applied to the discriminatory appraised values, or that petitioners' property is not appraised at more than its actual value, cannot save the taxing scheme.

In the proceedings below, and in this Court, respondent has advanced the unfounded notion that the Webster County Assessor applied a uniform method of as-

sessment to all property owners. *See* Pet. App. 6a; Resp. Br. in Opp. 10-12. This argument proceeds from the following syllogism: All assessments are based on 50 percent of appraised value. The consideration stated in the deeds for all property recently conveyed is used by the Assessor to establish the appraised value of that property. Therefore, the system of assessment is equal and uniform.

The obvious flaw in respondent's logic is that it fails to take into account the fact that most property in Webster County has *not* been recently conveyed. In the words of Justice Brotherton in dissent below, most property owners pay taxes based on "low, outdated assessed values," Pet. App. 10a, and the Assessor has refused to use evidence of recent sales or any other information to arrive at a current market value for properties that have not changed hands for many years. *See* Pet. App. 42a.

In effect, the County Assessor has created a dual system of property tax assessment. Those landowners who have held their property for years have their land appraised at a small fraction of its current value. Those landowners who are newcomers to Webster County have their land appraised at its current fair market value.[12]

In *Cumberland Coal Co.* v. *Board of Revision*, *supra*, this Court was confronted with a challenge to the assessment of coal property by the assessor and the commis-

[12] This assessment practice has been referred to as the "welcome stranger" approach. *See, e.g.*, Comment, *Hellerstein v. Assessor of the Town of Islip: A Response to Inequities in Real Property Assessments in New York*, 27 Syracuse L. Rev. 1045, 1061 (1976) ("newly-acquired parcels, although they may be equivalent in value to the long-held parcels, are assessed for a higher amount due to appreciation of land values. The 'new' owner—the 'stranger'—will pay higher taxes proportionately than the owner of a long-held parcel who 'welcomes' the fact that he consequently pays lower taxes").

sion of Greene County, Pennsylvania. The system of assessment at issue in that case was one in which the assessor appraised all coal-bearing land at the same rate per acre. He then applied a uniform rate of assessment of 50 percent to the appraised value to arrive at the assessments. The Cumberland Coal Company challenged the system based on the indisputable fact that veins of coal located in areas that were remote and inaccessible were far less valuable than coal deposits located in close proximity to rail or river transportation. Thus, the company claimed that uniform valuation of property discriminated in favor of those landowners whose coal property was more valuable because of its ready accessibility to means of transportation, and discriminated against those whose coal property was land-locked. This Court concluded, in a unanimous opinion, that the challenged system of assesment violated the Equal Protection Clause.

In reaching its holding, the *Cumberland Coal* Court squarely rejected the argument, renewed more than fifty years later by the respondent here, that the fact that all coal-bearing property was assessed uniformly at 50 percent of its value immunized the tax scheme from constitutional attack:

> In applying [equal protection] principle[s], the fact that a uniform percentage of assigned values is used, cannot be regarded as important if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure (according to the unit of valuation, as for example, an acre) as the property of other owners which has an actual value admittedly higher. *Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same.* [284 U.S. at 29 (emphasis supplied).]

This Court reiterated the point in *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517, 539-540 (1933), stating that "where a statute lays a tax upon property *ad valorem* at an even and equal rate, discrimination may result from the fact that the assessing officials systematically and intentionally value some property subject to the tax at a proportion of its true value different from that fixed with respect to other like property."

Respondent also argued below that so long as the assessments on petitioners' property fairly reflected the true value of that property, petitioners could not complain of discrimination. The court below seemed to accept this argument, emphasizing that "assessments based upon the price paid for the property in arm's length transactions are an appropriate measure of the 'true and actual value' of [petitioners'] property." Pet. App. 8a. Regardless of whether this is true, it is wholly irrelevant to the equal protection claim at issue. The point is that comparable property owned by others is not assessed on the basis of *its* actual value, but at a far lower level. As the dissenting justices point out below, "the quest for true value [cannot] override the *constitutional* requirement that taxation be equal and uniform." Pet. App. 10a (emphasis in original).

At least since the decision in *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350, 352-353 (1918), it has been "regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." *See, e.g., Southern Railway* v. *Watts*, 260 U.S. at 526; *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. at 445-446; *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. at 247; *Hillsborough* v. *Cromwell*, 326 U.S. at 624.[13]

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[13] *See also Southland Mall, Inc.* v. *Garner*, 455 F.2d 887, 889 (6th Cir. 1972) ("[i]n order to establish an equal protection violation

This proposition would seem self-evident from the very nature of the equal protection guarantee, which is concerned not with the substantive terms on which a State taxes but simply that the State not discriminate among similarly situated taxpayers. Indeed, the logic of the court below would find no equal protection violation if a State chose to impose a property tax on only one taxpayer, so long as the tax were not based on more than the actual value of that unfortunate taxpayer's property.

In this case, the Circuit Court found as a fact that properties in all respects comparable to petitioners' were appraised by the County Assessor at low, outdated values, while petitioners' properties were appraised at their current value. That court concluded that the Assessor and County Commission had systematically and intentionally underassessed long-standing "friends and neighbors" at the expense of newcomers to the Webster County tax rolls. Pet. App. 40a; EKE Pet. App. 72a. This was not equal treatment; it was unconstitutional discrimination.

II. The Discriminatory Taxation Is Intentional And Systematic

In considering whether the dramatic disparity in state taxation established on this record contravenes the guarantee of equal protection, it is important to recognize what is *not* at issue in this case. First and foremost, this is not a case involving the reasonableness of classi-

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it is not necessary for a taxpayer to prove that he was overassessed[;] [h]e may instead show that his property was assessed at its true value while other property was intentionally undervalued"); Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 Harv. L. Rev. 1374, 1375 (1962) ("the Court repeatedly has held that discrimination between parcels within the same class may indeed constitute a denial of equal protection. This requirement of intraclass equality will prevail in any conflict with a state's provision for full-value assessment").

fications under state law among different types of property for tax purposes. West Virginia is free to tax property owned by corporations and property owned by individuals at different levels,[14] and different types of corporations or different types of property at different levels.[15] It presumably could, if it chose, impose a tax on coal property alone, or tax such property at a higher level than other real property in the State. Any such classification for tax purposes carries with it a heavy presumption of validity, and will be sustained so long as it "rests upon some reasonable consideration of difference or policy." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527 (1959).

That is not what is at issue here. So far as is pertinent to this case, West Virginia does *not* classify property for tax purposes. Indeed, the West Virginia Constitution specifies that "[n]o one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value * * *." W. Va. Const. art. X, § 1.[16] The state constitution further provides that "all property, both real and personal, shall be taxed in proportion to its value," and that "all property subject to ad valorem taxation shall be assessed" at a uniform precentage of its value—currently 60 percent. *Id.* art. X, §§ 1, 1b. Under W. Va. Code § 11-3-1, "[a]ll property shall be assessed annually as of the first day of July *at its true and actual value* * * *" (emphasis supplied).

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[14] *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

[15] *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937); *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573 (1938).

[16] Distinctions are set forth with respect to maximum tax *rates* on certain personal property used in agriculture, residential property, farms, and property within or outside municipalities. *Id.* None of these is pertinent to this case.

Thus, state law draws no distinctions among property for purposes of appraisal and assessment. On the contrary, it mandates that all property be appraised and assessed on the same basis. The reason that petitioners' property is appraised and assessed—and therefore taxed—at levels many times higher than that of other comparable property is not because the State has chosen to differentiate between the properties for tax purposes, and the reasonableness of any such differentiation is not at issue. State law mandates that petitioners' property and other real property in the State be treated the same—that "*all* property * * * be taxed in proportion to its value," that "*all* property subject to ad valorem taxation * * * be assessed at" a uniform percentage of its value, and that "*all* property * * * be assessed * * * at its true and actual value." W. Va. Const. art. X, §§ 1, 1b; W. Va. Code § 11-3-1 (emphasis supplied).

State law, and the unambiguous and uncontradicted findings of the Circuit Court on comparability, thus resolve in this case what is often the most difficult question in considering an equal protection claim—whether the party discriminated against is "similarly situated" to those treated more favorably. *See Plyler* v. *Doe*, 457 U.S. 202, 216 (1982) ("The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States"). Here, the State has grouped all real property together for purposes of tax appraisal and assessment, defining the class of those similarly situated.[17]

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[17] This is not to say that a State may not engage in reasonable classification consistent with the Federal Constitution even though state law appears to bar such distinctions. As Justice Frankfurter has remarked, "the Equal Protection Clause is not a command of candor." *Nashville, Chattanooga & St. Louis Railway* v. *Browning*, 310 U.S. 362, 369 (1940). The important point is that what is at issue here is not a state effort to distinguish among types of property for tax purposes, but rather a deliberately adopted system which, according to the State, treats property owners equally for purposes of *ad valorem* taxation—even though it results in peti-

Nor is this a case involving any question of the exercise of judgment by an assessor, or any question of a good faith mistake in a particular valuation decision. Courts properly accord considerable deference to valuation decisions, in light of the often complex questions of judgment that surround any effort to ascertain value, and respondent and the court below relied heavily on this principle of deference. *See* Pet. App. 8a. But deference to the judgment of the Assessor is simply not at issue in this case. Petitioners are not suggesting that this Court or any other set itself up as a board of review to second-guess the judgment of assessors concerning the value of particular parcels of property. The dramatic disparity in valuation established as a matter of record here resulted not from any exercise of judgment or discretion by the Assessor, but precisely because the Assessor deliberately elected *not* to exercise *any* judgment or discretion.

The findings of the Circuit Court—undisturbed by the Supreme Court of Appeals—are quite explicit on this point. The Circuit Court found that "the assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." Pet. App. 29a; *see* EKE Pet. App. 59a. The disparity in assessments in fact was not based on any arguable differences among the parcels, and the Assessor did not contend that it was.

> The assessor admitted on examination that she did not, in making her appraisement, physically inspect or view the petitioners' real estate, that she had not compared it to adjacent or contiguous tracts, that no scientific examinations or tests had been made or performed, by her or at her request or direction, and that appraisements had not been sought or considered * * *. [Pet. App. 30a.]

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tioners' property bearing a tax burden more than 35 times that of comparable property.

This is thus emphatically not a case in which any question of deference to the judgment of the assessor is involved.[18]

This is also not a case of temporary distortions in equal treatment caused by changes in appraisal methods or cyclical programs of reassessment. Courts generally reject challenges to such temporary disparities, provided that all property will, within a reasonably limited period of time, be subject to reassessment or reappraisal under the new system.[19] Unlawful discrimination will be found, however, if the reappraisal is selective or does not reach all property within a limited time. For example, in *Sparks* v. *McCluskey*, 84 Ariz. 283, 327 P.2d 295 (1958), the assessor applied a new formula to determine the value of property on certain streets, resulting in increases in assessments of from 300 to 1600 percent, but simply carried forward the old assessments of other comparable property. The state Supreme Court found that the increased assessments "were made intentionally and systematically" and struck them down as "an intentional overassessment of a portion of a certain class of property in specified areas as compared with assessment of like property in the rest of the county." 84 Ariz. at 286-287, 327 P.2d at 297.

The assessor asserted that he would eventually apply the new formula to all property, but the court held that that fact could not save the unconstitutional discrimination:

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[18] Indeed, it is precisely because the appraisal policy adopted by Webster County abnegates *any* exercise of judgment by the Assessor that the policy is considered unacceptable under professional assessing standards. *See generally* Brief Amicus Curiae of the International Association of Assessing Officers in Support of Petitioners.

[19] *See, e.g., Recanzone* v. *Nevada Tax Comm'n*, 92 Nev. 302, 550 P.2d 401 (1976); *Meyer* v. *Cuyahoga County Board of Revision*, 58 Ohio St. 2d 328, 390 N.E.2d 796 (1979).

> We cannot subscribe to the proposition that grossly inequal values by the use of a specific method of assessment may be placed on a small portion of a class of property and remain subject to the disproportionately excessive value for an indefinite number of years in the future until the taxing officials can get around to using the same method upon the other like properties. [84 Ariz. at 287, 327 P.2d at 297.]

In *Ernest W. Hahn, Inc.* v. *County Assessor*, 92 N.M. 609, 592 P.2d 965 (1978), the court rejected a similar claim, noting that at his current pace it would take the assessor 50 to 100 years to reappraise all property in the jurisdiction, and that any "cyclical program of revaluation * * * must be completed within a reasonably limited time." 92 N.M. at 612-613, 592 P.2d at 968-969.

Here, there is not even any question of cyclical reappraisal. In this case only a small segment of property—that which has recently been sold—is reappraised at current value, without *any* plan to subject all property to eventual reappraisal. The record reflects that the Webster County Assessor has for years ignored all relevant indicia of the true value of properties in the County, other than stated deed consideration. When a property within the County is bought and sold, and the assessed value raised as a result, no effort is made to adjust the assessed values of comparable properties lying adjacent to the conveyed property to reflect the demonstrated increase in *their* fair market value. Equalization is not simply "an indefinite number of years in the future"—itself sufficient to establish a constitutional violation—but in fact can *never* occur.[20]

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[20] Indeed, as the Circuit Court noted, even if the assessments of petitioners' property were frozen, it would take *over 500 years* for the *de minimis* increases in the assessments of other comparable property to catch up with petitioners' present assessments. Pet. App. 28a; *see* EKE Pet. App. 58a. *See* footnote 8 *supra*.

Nor is this a case in which the assessor has made an "honest effort" to remedy the effects of disparate assessment following the

The discrimination established on the record in this case is not the result of state classification, the exercise of judgment by the assessor, or a good faith mistake. It is not the result of mere temporary dislocation due to a cyclical reappraisal program or a change in appraisal methods. The discrimination is rather the result of a deliberately adopted policy. As such, it is clearly a violation of the Fourteenth Amendment.

The majority below, without explanation, concluded that the proven discrimination in the appraised values of real property in Webster County was not unconstitutional because it was not "intentional and systematic." That conclusion was not based on any rejection of the Circuit Court's factual findings. It was instead an erroneous legal conclusion, based on a misunderstanding of what the "intentional and systematic" test requires.

The purpose of the "intentional and systematic" test is to avoid intrusion into state tax practices on the basis of disparities that are occasional and sporadic, or the result of mere errors in judgment. *See Southland Mall, Inc.* v. *Garner*, 455 F.2d at 889. Thus, the early cases establishing the "intentional and systematic" test all drew a distinction between actionable discrimination and mere errors in judgment.[21]

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adoption of a new method of valuation, as in *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. at 353. On this record, gross disparities have continued unremedied for a period of over ten years.

[21] *See, e.g., Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. at 447 ("mere errors of judgment do not support a claim of discrimination, but * * * there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity"); *Southern Railway* v. *Watts*, 260 U.S. at 526-527 ("plaintiffs have clearly failed to establish that there was intentional and systematic undervaluation by the county boards. * * * At the most there have been errors of judgment"); *Chicago Great Western Railway* v. *Kendall*, 266 U.S. 94, 98-99 (1924) ("It is not enough * * * that the taxing officials have merely made a mistake. * * * There must be clear and affirmative showing that

What is challenged here is a systematic approach to assessment deliberately "adopted as a practice." For purposes of the "intentional and systematic" test, this case is thus indistinguishable from *Cumberland Coal Co.* v. *Board of Revision, supra.* There, the Court concluded that a tax assessor's policy of arriving at a single valuation figure for all coal property in the jurisdiction, despite differences in value, constituted intentional and systematic discrimination in violation of the Fourteenth Amendment:

> There is no question that the assessments under review were made pursuant to a deliberately adopted system. The case is not one of mere errors in judgment in following a proper method, but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity. [284 U.S. at 25 (citations omitted).]

So too here there is no question that the challenged assessments were made "pursuant to a deliberately adopted system." It is undisputed that the Assessor, adhering to the "welcome stranger" approach, valued recently-conveyed property at the value declared in the deeds, without raising the assessment of comparable property to that level. Even the three majority justices below acknowledged that this was "the policy of the assessor's office during the relevant time period" and that "this method was uniformly followed." Pet. App. 6a. Again, as in *Cumberland Coal*, this is not a case of "mere errors in judgment"; the policy adopted by the Assessor substituted for any exercise of judgment.

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the difference is an intentional discrimination and *one adopted as a practice*") (emphasis supplied).

See also Weissinger v. *Boswell*, 330 F. Supp. 615, 622 (M.D. Ala. 1971) (three-judge court) ("this lack of uniformity has resulted not from mere mistake or error in judgment, but from the intentional and systematic refusal of [the assessors] to perform their duties in accordance with state law").

To establish a violation of the Equal Protection Clause, petitioners need not show that the Assessor and the County Commission were actuated by evil motives or bad faith, or that they deliberately manipulated the data on which the assessments were based. That is not what the "intentional and systematic" test requires. As the Court noted in *Cumberland Coal*, discrimination is none the less systematic and intentional "because of belief in its validity." 284 U.S. at 25.[22]

In any event, the record in this case establishes that the discriminatory assessments were not only intentional and systematic, but purposeful as well. The sheer magnitude of the discrimination in assessments belies any argument that the disparities were somehow not intended by the local elected officials, who chose to adopt this "plan of assessment" rather than follow the appraisal guide issued by the State Tax Commissioner, or engage in *any* actual appraisal of property in the County.[23] As one court noted in striking down a taxing scheme under which the complainant's property was assessed at 143 percent the level of comparable property—as opposed to the more than 3,500 percent at issue here—"overvaluation of property may be so excessive and made under such circumstances as to justify the conclusion that it was not honestly made

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[22] *See, e.g., Sparks* v. *McCluskey*, 84 Ariz. at 286-287, 327 P.2d at 297 ("There is no necessity of proving actual fraud. * * * [I]f the result of these intentional acts is discrimination the assessments cannot stand irrespective of honest motives"); *Ernest W. Hahn, Inc.* v. *County Assessor*, 92 N.M. at 613, 592 P.2d at 969 ("good faith alone will not justify an assessment which is discriminatory in fact").

[23] The Circuit Court found that after the Assessor received the Tax Commissioner's appraisal guide, "it was placed in a drawer where it remained unused and abandoned until the day of the hearing." Pet. App. 34a. That court further found that the Assessor never conducted or relied upon any actual appraisals. *See* Pet. App. 30a. A deliberate choice was made to employ the "welcome stranger" approach instead.

and was known to be excessive." *In re Chicago Railways*, 175 F.2d 282, 291 (7th Cir.), *cert. denied*, 338 U.S. 850 (1949).[24]

Nor can it be overlooked that the assessment scheme deliberately adopted by the Webster County officials—and adhered to even though the dramatic disparities were "repeatedly brought to the attention of the assessor and the Board of Equalization and Review over the ten year period involved," Pet. App. 40a-41a—shifts the property tax burden from long-term, established property owners to newcomers to the County. As might be expected, and as the Circuit Court here found, when property assessment lies in the hands of elected assessors and county commissioners, patterns of inequality may well tend to hurt newcomers to the county or corporate land-owners, and to serve the interests of the "friends and neighbors" of the taxing officials. Pet. App. 40a. Thus, the discrimination evidenced in this case is as offensive as it is irrational.[25]

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[24] *See also Savage* v. *State Tax Comm'n*, 722 S.W.2d 72, 79 (Mo. 1986) (en banc) (160 percent disparity "so grossly excessive as to be entirely inconsistent with an honest exercise of judgment"); *United States* v. *City of Manassas*, 830 F.2d 530, 534 n.5 (4th Cir. 1987) (striking down state tax scheme as discriminatory against United States, noting that "we must question whether a state with such a taxing scheme can truly be said not to intend any discrimination * * *, in light of the maxim that every man is considered to intend the natural and probable consequences of his acts, which is yet in vogue in civil cases"), *aff'd*, 56 U.S.L.W. 3737 (U.S. April 26, 1988); Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 Tex. L. Rev. 885, 910 n.110 (1973) ("discriminatory intent [in property tax assessment] may be implied from the magnitude of the discrimination"). In an opinion below during injunctive proceedings in this case, Justice Neely stated that "the gross overassessment of the taxpayer's property indicates constructive fraud." *State ex rel. Ayers* v. *Cline*, 342 S.E.2d 89, 96 (W. Va. 1985) (dissenting opinion).

[25] The State has thus far made no effort to justify the dramatic disparity shown on the record, and the court below cited no justifi-

The discrimination resulting from Webster County's deliberately adopted policy is of historic magnitude. This Court has struck down discriminatory practices that taxed the complainants' property at twice the level of comparable property. *Cumberland Coal*, *supra*; *Sioux City Bridge*, *supra*. Other courts, properly applying this Court's principles, have struck down state taxing schemes yielding even smaller disparities. *See, e.g., Louisville & Nashville R.R.* v. *Public Service Comm'n*, 631 F.2d 426 (6th Cir. 1980) (complainant taxed at 158 percent level of comparables), *cert. denied*, 450 U.S. 959 (1981); *Weissinger* v. *Boswell*, *supra* (177 percent); *Savage* v. *State Tax Comm'n*, *supra* (160 percent).[26] Here the disparities in assessment between petitioners' property and comparable property ranged from *800 to 2000 percent* for Oneida-Shamrock and from *3200 to 3500 percent* for Allegheny Pittsburgh and East Kentucky Energy.

The record plainly establishes that the enormous disparities in assessment in Webster County resulted from a

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cation. It is difficult to imagine what legitimate state purpose the discrimination could promote, given the requirement under state law that *all* property be taxed in proportion to its actual value. In addition, this Court has held that it is not a legitimate purpose for States to favor long-term over short-term residents, *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel* v. *Williams*, 457 U.S. 55 (1982), and that the States are not free to tax the property of non-residents when they do not tax identical property owned by residents. *WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117 (1968). Favoring long-term property owners over new owners raises the same concerns of parochial discrimination and cannot be considered a legitimate purpose, particularly when state law expressly mandates equal treatment. *See Lyng* v. *International Union, UAW*, 108 S. Ct. 1184, 1192 n.8 (1988) ("if a statute is not rationally related to any legitimate governmental objective, it cannot be saved from constitutional challenge by a defense that relates it to an *illegitimate* governmental interest") (emphasis in original).

[26] *See also Duval* v. *City of Manchester*, 111 N.H. 375, 286 A.2d 612 (1971) (130 to 200 percent); *Bettigole* v. *Assessors of Springfield*, 343 Mass. 223, 178 N.E.2d 10 (1961) (170 percent).

deliberately adopted system. The legal conclusion of the court below to the contrary—unexplained and inexplicable—cannot be permitted to stand.

III. Petitioners Cannot Be Relegated To Attempting To Raise The Assessments Of Others

The court below rested its holding that there was no constitutional violation in part on the blithe assertion that state law afforded a remedy for "[a]ny dispute [petitioner has] with the assessment of other landowners in Webster County * * *." Pet. App. 8a. According to the court below, petitioners could not seek to have their assessments lowered to prevailing levels, but were free to cure any unconstitutional discrimination by attempting to have the assesments of all *other* taxpayers *raised*. Quoting from a recent decision of its own, the court concluded that " 'taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced *as long as their property is valued at market value*. Instead, they should seek to have the assessments of other taxpayers raised to market value.' " [27]

In announcing the availability of this "remedy," the majority ignored the finding of the Circuit Court that petitioners had repeatedly, for ten years, sought action by the Assessor and the County Commission to remedy the undervaluation of neighboring properties, and that "the assessor and Board of Equalization and Review, have just as consistently and repeatedly refused to equalize petitioners[']assessment downward *or to equalize the real estate assessments of others upward*, though petitioners[] have requested relief in both directions." Pet. App. 41a (emphasis supplied).

In any event, this Court has unambiguously held, in a series of unanimous opinions authored in turn by Chief Justices Taft and Hughes and Justices Brandeis and

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[27] Pet. App. 9a (quoting *Killen* v. *Logan County Comm'n*, 295 S.E.2d at 709) (emphasis in decision below).

Douglas, that taxpayers who suffer unconstitutional discrimination through the relative overassessment of their property cannot be relegated to seeking to raise the assessments of other taxpayers. In *Sioux City Bridge* v. *Dakota County, supra,* county assessors assessed a company's property at 100 percent of its true value, while assessing all other property at 55 percent. The Nebraska Supreme Court, like the court below in this case, held that "when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced." 105 Neb. 843, 848, 182 N.W. 485, 487 (1921). This Court unanimously reversed. Chief Justice Taft, writing for the Court, concluded that the result reached by the Nebraska Supreme Court would effectively deny the injured taxpayer any remedy at all.

> This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. [260 U.S. at 446.]

In *Cumberland Coal, supra,* this Court repeated Chief Justice Taft's holding quoted above in a unanimous opinion delivered by his successor, Chief Justice Hughes. The Court rejected the view of the Pennsylvania Supreme Court that the owners of coal-bearing land had no standing to complain about the assessments of other properties so long as their own land was not assessed in excess of its fair market value. *See* 284 U.S. at 28.

The same Term, the "remedy" espoused by the Supreme Court of Appeals of West Virginia in this case

again was rejected by this Court. In *Iowa-Des Moines National Bank* v. *Bennett*, *supra*, the Court upheld the right of the petitioners to obtain refunds of state property taxes based on discrimination in the tax rates applied to shares of stock in national banks as compared to the rates levied against shares of competing domestic corporations. Justice Brandeis, speaking for a unanimous Court, observed that "[i]t may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors." 284 U.S. at 247. But where the State has not taken any such prompt corrective action, and the disfavored taxpayer seeks relief in court, it is not enough to say that the taxpayer may seek to raise the taxes of others:

> [I]t is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid * * *. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. [*Id.*]

Again, in *Hillsborough* v. *Cromwell*, *supra*, a unanimous Court held that a state remedy that restricted the complaining taxpayer to proceedings to raise the taxes of others "is not adequate to protect [the taxpayer's] rights under the federal Constitution." 326 U.S. at 624. The Court acknowledged that the right at issue was the right to equal treatment, and that the taxpayer could not object if equality were achieved by raising the taxes of others rather than lowering his own. "The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes

of other members of the class." *Id.* at 623 (citing cases).[28]

Contrary to respondent's contention, *Louis K. Liggett Co.* v. *Lee*, *supra*, does not support the decision below. *See* Resp. Br. in Opp. 15. The taxpayer's claim in that case was that a few taxpayers were avoiding paying any tax, because of dereliction of duty by the tax collectors, not that it paid taxes at a discriminatory level compared to all other taxpayers. 288 U.S. at 539. Indeed, the Court expressly reaffirmed the principles applicable to a case such as the present one: "[I]n the case of unequal and discriminatory assessment, to hold that the complaining taxpayer's only remedy is to have the assessments on all the other property raised to a level equal with that of his own is in effect to deny any remedy whatever." *Id.* at 540.

As in any case of an equal protection violation, the State can cure the discrimination for the future by either raising the assessments of the favored taxpayers, or lowering those of petitioners. That is entirely up to the State. The State may not, however, deny the right of those discriminated against to secure "a *mandate* of equal treatment," regardless of the future remedial steps it may or may not take. *Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984) (emphasis in original) (relying upon *Iowa-Des Moines National Bank* v. *Bennett*, *supra*). The principle is no different from that applied in this Court's decisions that have recognized the right of those discrimi-

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[28] Although petitioners relied heavily upon these precedents before the West Virginia Supreme Court of Appeals, that court did not distinguish this Court's decisions, or even cite them. Nor has respondent explained why these decisions are not controlling, confirming instead that "it is the settled law of the State of West Virginia that if a taxpayer[']s property is assessed at market value, if the taxpayer believes that other property is not assessed at market value, his remedy is to compel the other assessments to be raised and he is not entitled to have it lowered." Resp. Br. in Opp. 14.

nated against by underinclusive statutes to challenge the disparate treatment, even if the remedy is not to extend the benefits to the claimants but to withhold them from all.[29]

In addition, more than the future is at stake here. Petitioners' timely challenges to the discriminatory assessments of their property go back more than ten years, and it is not possible to remedy that past discrimination —challenged in a timely manner—by raising the assessments of all others who may have owned property in Webster County at any time within the past decade. Nor is such a "remedy" any more realistic with respect to the present. The impracticality and cost of one or a few disfavored taxpayers attacking and trying to raise the assessments of *all* others in the county, with the others presumably free to come into court and defend their assessments, case by case, led this Court to conclude unanimously that "it is plain that [such a] state remedy is not adequate to protect [the taxpayer's] rights under the federal Constitution." *Hillsborough* v. *Cromwell*, 326 U.S. at 624.

In any event, it is clear that any such remedy is not adequate or available in *this* case. As the Circuit Court found, "the inequality of the assessment of petitioners' real estate and that of comparable tracts has been repeatedly brought to the attention of the assessor and Board of Equalization and Review over the ten year period involved." Pet. App. 40a-41a. Despite petitioners' efforts, the county officials "have just as consistently and repeatedly refused to equalize petitioners[']assessment downward or to equalize the real estate assessments of others upward, though petitioners[] have requested relief in both directions." Pet. App. 41a. Thus, even if a State

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[29] *See, e.g., Heckler* v. *Mathews, supra*; *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980); *Califano* v. *Webster*, 430 U.S. 313 (1977).

could relegate a taxpayer to attempting to raise the assessments of all others—contrary to this Court's unanimous decisions in *Sioux City Bridge*, *Cumberland Coal*, *Iowa-Des Moines National Bank*, and *Hillsborough*—petitioners have undertaken such an effort, and have been rebuffed.

The chimerical nature of such a "remedy" is confirmed by considering what it would entail. The property taxes of all others in the county would need to be increased, on average, by a factor of 35 to ensure equal treatment with petitioners.[30] As the Circuit Court concluded, "[s]hould uniformity of taxation be attempted through an increase of the assessment of Webster County real estate to the level of that of petitioners, * * * it seems probable that individual ownership of real estate of the nature owned by the petitioners would shortly disappear except for those of great wealth." Pet. App. 44a. The Circuit Court considered raising the assessments of all others, but decided to lower those of petitioners instead. Whatever assessment policies are adopted by Webster County for the future, petitioners cannot be barred from obtaining relief for past discrimination and from securing the "*mandate* of equal treatment" to which they are entitled. *Heckler* v. *Mathews*, 465 U.S. at 740 (emphasis in original).

* * * *

This case is brought by companies that can afford to challenge the discriminatory treatment being employed against them. But the discriminatory system adopted by

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[30] The Circuit Court calculated the increases that would be necessary to raise specific comparable neighboring parcels to Oneida-Shamrock's level of assessment. To cite just a few specific examples, a parcel of property currently assessed at $35,310 would need to be increased to $605,147.99, another currently assessed at $211,689.38 would need to be increased to $3,630,405.40, and a third currently assessed at $28,622 would need to be increased to $490,411.95, just to be treated on a par with Oneida-Shamrock's property. *See* EKE Pet. App. 61a-62a & chart at EKE Pet. 9.

Webster County is not only applied to corporations. Individuals and families buying their first or new homes in Webster County are equally subject to the "welcome stranger" treatment, often in situations in which they cannot afford the disproportionate tax but also cannot afford to mount an attack on its constitutionality. Petitioners are thus "stand-ins" for untold numbers of new homeowners—or those who wish they could be.[31] The dual system of assessment adopted by the Webster County Assessor constitutes "an intentional violation of the essential principle of practical uniformity" in real property taxation, in contravention of the Equal Protection Clause. *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. at 447. We respectfully submit that for all those affected by this unfortunate discrimination, the judgment below should be reversed.

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[31] *See generally* Brief Amicus Curiae of the National Association of Realtors in Support of Petitioners.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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Nos. 87-1268, 87-1310

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In The

Supreme Court of the United States

October Term, 1988

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,

v.

COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA,
Respondent.

EAST KENTUCKY ENERGY CORPORATION, ONEIDA COAL COMPANY, INC., and SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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QUESTIONS PRESENTED

I.

Should this court review as a substantial equal protection federal question, a state ad valorem tax case in which the State Supreme Court decided, on a record insufficient to support any other finding, that there was no intentional and systematic discrimination?

II.

Does the equal protection clause of the Fourteenth Amendment relieve petitioner-taxpayer of its duty to pay ad valorem taxes on property which has been accurately assessed substantially higher than surrounding property, when the increase in petitioner's valuation reflects actual differences between petitioner's property and surrounding property?

III.

Does the Equal Protection Clause require a county tax assessor to ignore her statutory duty to utilize the sales price of all recently sold tracts during her annual reassessment unless she automatically alters the assessed value of all tracts within some arbitrary radius of each recently sold tract?

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STATEMENT OF THE CASE

The petitioners' argument rests upon the assertion that the coal companies own "homogeneous" tracts of 7374 acres and 7783 acres which possess average assessed values of $2,043 and $376.95 per acre, respectively. Petitioners then use these "*average*" values for their "homogeneous" tracts and compare them to assessments on other "comparable" property in Webster County. (Pet. Br. p. 9) Petitioner East Kentucky failed to disclose to the Court that its "homogeneous" tract of 7347 acres is comprised of nineteen (19) tracts that have assessed values varying from a low of $300.07 per acre to a high of $4,967.74 per acre. Petitioner Oneida failed to disclose that its "homogeneous" contiguous tract of 7783 acres consists of six tracts that have assessed values varying from a low of $50.00 per acre to a high value of $560.00 per acre.[1]

It is not disputed that there is a great variance in the valuation of coal properties generally. In fact, there is considerable variation not only between petitioners' properties but within each petitioner's tracts.

In 1974 Allegheny Pittsburgh purchased the property that comprises its 7374 acres for a total of $24 million. This property was resold to Eastern Kentucky Energy in 1982 for $30 million. The tracts which make up the 7374 acres, the assessed valuation, and the assessed valuation per acre are:

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[1]The assessed value per acre is arrived at by dividing the number of acres into the assessed valuation. In the event of percentage ownership of the property, the result described above is multiplied by the percentage of ownership.

Tract	Assessed Valuation
83.5 Acres Minerals	$ 5,500.00
4,287 Acres Fee Less O & G	13,300,580.00
620 Acres Coal	238,700.00
35.5 Acres Fee	19,360.00
1,335 Acres Fee	719,260.00
21.5 Acres Fee	11,860.00
3.75 Acres Fee	8,470.00
1.5 Acres Surface	2,370.00
1.75 Acres Surface	4,620.00
0.31 Acres Surface	1,540.00
2.36 Acres Fee	6,930.00
100 Acres Coal	34,560.00
540 Acres Fee	436,590.00
82.48 Acres Surface	24,750.00
100 Acres Minerals	34,560.00
48.5 Acres Surface	22,180.00
5.1 Acres Less Coal	1,390.00
25 Acres Less Minerals	12,010.00
12.75 Acres Minerals	5,540.00

In 1977 Oneida Coal purchased its 7783 acres for $5.9 million. The six tracts which comprise this 7783 acres, its assessed value and the assessed value per acre are:

Tract	Assessed Valuation
3700 Acres Coal	$1,394,710.00
1/2 int. 44.41 Acres & 2/3 Min	8,400.00
15.0 Acres	8,400.00
1/2 int. 15 Acres Surface	8,400.00
870 Acres	43,500.00
4083 Acres Coal	1,539,090.00

The parcel of property that skews the average for Eastern Kentucky is the 4287 acres with the assessed val-

ue of $13,300,500 or $3,102.52 per acre. The reason for the extreme value of this property relates to the existence of 32,000,000 tons of coal within a 1500-acre conglomeration of tracts which can be recovered by the least expensive mining method available in West Virginia, strip mining. (Tr.—Feb. 12, 1985 Hearing, Before the Co. Comm. pp. 91-97)

It is not disputed that the Assessor of Webster County uniformly assessed all property at the appropriate percentage of its appraised value. It is not disputed that the Assessor of Webster County uniformly revalued transferred property based upon the declaration of value filed at the time of transfer. Nor is it disputed that between 1975 and 1986 the Assessor of Webster County raised the assessed values on all properties that had not undergone recent transfers by 33.1 percent, *i.e.*, a 10 percent increase in 1976, a 10 percent increase in 1981, and a 10 percent increase in 1983, with a cumulative effect of a 33.1 percent increase.

No evidence was presented as to the market conditions applicable to the adjoining tracts or as to the proven reserves upon those tracts. The only evidence in the record as to the "true and actual value" of the adjoining tracts is the assessed valuation of the adjoining tracts as contained within the taxing books for Webster County, West Virginia. The trial court never made any finding as to the true and actual values of the adjoining tracts.

On July 17, 1987, the Supreme Court of Appeals of West Virginia upheld the Board of Equalization and Review and reversed the circuit court, holding that no disparate treatment occurred and that the uniform use of

recent deed values as the basis for appraising property subject to ad valorem taxation does not violate either the equal and uniform provision of the West Virginia Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. THE INSTANT CASE DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION, AND THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS BEING IMPROVIDENTLY GRANTED.

A. Factual Finding By State Court Negates Federal Question.

The only federal quesion asserted in petitioner's brief in the case at bar is whether the *application* of a state statute in a particular case by a local taxing authority was violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Pet. App. p. 2).

Although a federal question has been raised, it is this Court's duty to dismiss the Writ of Certiorari if the question presented is not *substantial* in nature. *Sugarman v. United States,* 249 U.S. 182 (1919); *Zucht v. King,* 260 U.S. 174 (1922).

The West Virginia Supreme Court of Appeals reviewed the conflict of evidence and found that:

> The record does not support the trial court's ruling that the actions of the Assessor and board of review

> constitute 'intentional and systematic' discrimination. The assessments based upon the price paid for the property in arm's length transactions are an appropriate measure of the 'true and actual value' of appellee's [petitioner's] property. (Pet. App. p. 7a)

This factual finding by the State court in review of the facts is conclusive.

> [A]ll those matters which are usually termed issues of facts are for conclusive determination by the State courts and are not for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scrupple. *Watts v. Indiana,* 338 U.S. 49, 50 (1940).

The finding by the State court negates the existence of any *substantial* federal question under the Equal Protection Clause. An essential requirement to invoke the protection of the Fourteenth Amendment is that the discrimination must be *intentional and systematic. Southern Railway Co. v. Watts,* 260 U.S. 519 (1923). The review of the facts by the State court and the resolution of the conflict of evidence in finding no intentional and systematic discrimination is fatal to jurisdiction.

B. Record is Inadequate to Present and Decide the Federal Question.

As was noted in the Statement of Facts, taxpayer/petitioners never presented any evidence that the true and actual value of the adjoining "comparable" tracts was other than the value from which the assessed value included by the assessor in the land book was based. There never was, nor on the record below could there be, any finding that the adjoining tracts were undervalued, and if so, by what amount. *Sioux City Bridge Co. v. Dakota*

Co., 260 U.S. 441 (1923), cited and relied upon heavily by petitioners, pointed out the necessity for a determination of all necessary predicate facts and remanded for that purpose. This case is distinguishable, in that here a full hearing was held in which the petitioners failed to present sufficient evidence to meet their burden of proof and the Supreme Court of Appeals of West Virginia, in its decision, so found, in that the record did not support the trial court's findings. (Pet. App. p. 8a) The petitioner's own expert, Ronald Mullanex had to concede that he had no knowledge of proven mineral reserves on the other "comparable" property. A tract with proven reserves of 32,000,000 tons of coal that can be strip mined is far more valuable than a similar number of acres with *no* proven reserves. The West Virginia Supreme Court correctly recognized that this evidence could not support a finding of intentional and systematic discrimination.

Accordingly, it would be appropriate for the Supreme Court to find in the absence of evidence of undervaluation and in view of the inadequacy of the evidence of comparability of the adjacent properties, the record does not present a substantial Federal question to this Court.

II. THE ASSESSOR'S ACTIONS IN VALUING PETITIONER'S PROPERTY DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Standard of Review

The Court accords great leeway toward methods used by taxing officials in determining whether property valuations for taxation purposes violate the Equal Protection Clause. It will not intervene merely on the ground of a mistake in judgment on the part of the officer to whom the

law entrusted the duty of assessment. *Coulter v. Louisville & Nashville R.R. Co.*, 196 U.S. 599 (1905). There must be something more. *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350 (1918). The violation must be occasioned by an improper execution of the taxing statute that amounts to intentional and systematic discrimination by the taxing official. *Id.* at 350.

As noted in *Coulter*, although there is a natural inclination to believe that undervaluation of others' properties is probable when suggested, such undervaluation must be proven. In *Coulter*, a taxpayer contended that it was denied equal protection of the laws in that it was taxed at fair cash value in accordance with the laws of Kentucky, while there was a uniform and general undervaluation of other property. The Court declined to find discrimination as it could not find clear evidence concerning the appropriate valuations and would not intervene merely on the grounds that there was a mistake in judgment.

Proof of an unequal assessment is not enough to result in a finding that there is a violation of the Equal Protection Clause. Every taxation system necessarily results in some inequality. See *May Department Stores v. State Tax Comm'n*, 308 S.W.2d 748 (1958). What must be proven is that such inequality is caused by an intentionally adopted discriminatory system, not merely a system where an evaluation scheme results in imperfect assessments.

In applying these standards, the good faith of the taxing official is presumed. *Southern Railway Co. v. Greene*, 216 U.S. 400 (1910). Further, the Court has recognized that actions of an assessor are to be evaluated

in light of the particular circumstances surrounding the assessor's evaluation. In *Sunday Lake,* the Court addressed the question of whether a tax assessor who assessed a piece of property at full value, while property was generally assessed at not exceeding one-third of its actual worth, violated the Equal Protection Clause. The Court found that the action was not incompatible with an honest effort in new and difficult circumstances to adopt valuations not relatively unjust or unequal. In so holding, the Court recognized that at the time of the valuation there was insufficient evidence before the board to justify immediate and general revaluations.

The deferential treatment accorded to taxing officials is essential to reviewing property tax evaluations for Equal Protection Clause purposes. Failure to apply a tolerant and flexible standard to valuation decisions would result in an abundance of litigation because valuation is an inexact science and unavoidably results in some inequality. At stated in *Supervisor of Assessments, etc. v. Southgate Harbor,* 279 Md. 586, 369 A.2d 1053 (1977), quoting from *State Tax Comm'n v. C. & P. Tel. Co.,* 193 Md. 222, 66 A.2d 477, 482 (1949), the court noted:

> Valuation of property for taxation is one of the oldest forms of administrative power and the courts should not interfere with the exercise of this administrative power unless it is unlawful, unreasonable, or against the substantial weight of the evidence. Perfect equality is unattainable. If assessment could be upset by comparison of a few widely different properties, on the basis of a selected few of the many elements or evidences of value, no assessment could stand.

Id. at 1057.

The cause now before the Court represents the very essence of those concerns which have consistently motivated the Court to adopt a deferential standard in reviewing taxing statutes under the Equal Protection Clause of the Fourteenth Amendment. The cause before the Court results from the local assessor's compliance with the requirements of a statutory assessment scheme that has been found by this Court to be constitutional. See *Charleston Fed. Sav. & L. Ass'n v. Alderson,* 324 U.S. 182 (1944). When examined in light of the circumstances, the assessor's evaluation will not be found violative of the Equal Protection Clause.

B. The Increase In Petitioner's Valuation Reflects Differences Between The Petitioner's Property And Surrounding Property.

The assessor's valuation of petitioner's property did not constitute a violation of the Equal Protection Clause because the valuation was merely a reflection of the uniqueness of petitioner's property when compared to surrounding properties. Such action does not constitute unequal treatment. Ultimately, this Court is being enticed to find an equal protection violation based solely on the fact that taxes have risen "dramatically" on petitioners' property. The evidence presented by the petitioners fails to prove that there are *any* other properties situate in Webster County, West Virginia, of comparable value, that are underassessed.

Mr. Ronald Mullanex, the expert for East Kentucky Energy, testified that other tracts in the area have the same geological strata, but that he did not have any knowledge of proven reserves on those "comparable" tracts.

(Res. Br. p. 24a) Mullanex further testified that the proven reserves on the East Kentucky Energy properties were *at least* thirty-two million (32,000,000) tons of low sulfur coal that were recoverable by the strip mining method alone. (Res. Br. in Opp. p. 21a)

Mullanex's testimony clearly refutes petitioner's claim that the valuation of its property is not based upon any "arguable differences" between the petitioners' property and adjacent or contiguous tracts. A known and confirmed mineral estate is worth substantially more than a property which might have some speculative mineral content of unknown extent or quality. The willingness of one of the petitioners to purchase its tracts at a market price of $24 million in 1974 bears irrefutable witness to the fact that the "dramatic disparity" in valuation between the subject property and contiguous tracts results from the petitioners' acute and highly refined judgment of the value of known coal reserves, and not from any failure or default of the county assessor.[2]

Neither of the protesting taxpayers offered competent testimony through appraisers, or similar experts, as to the true and actual values of the comparable tracts. The record is devoid of any evidence to establish that these alleged "comparable" tracts were not assessed at true and actual value. The statistical data submitted by the protesting taxpayers was a mere compilation of the values on the land books without regard to the location, topog-

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[2]Interestingly, the property was sold for $100,000 in the immediately preceding sale in 1969. (Exhibit L, Feb. 12, 1985, Hearing before the County Comm'n, p. 47.)

raphy, accessibility or other factors (especially proven coal reserves) that may affect market value.

Close analysis of Exhibits B and C (Pet. Br. p. 22a), a chart of the *allegedly* "comparable" tracts, reveals that petitioners are comparing apples and oranges.[3]

First, the petitioners' compilation of tracts that make up their 7000 plus acres of property in Webster County are themselves (through the operation of the free market) of dramatically different value. Thus, the use of an "average" assessment is in itself, misleading. If one were to compare the Eastern tract of 21.5 acres, fee valued at $11,860.00 ($551.63 per acre) with the Oneida 15 acres, valued at $8,400.00 ($560.00 per acre) with one of the truly comparable pieces of property, the 13.5 acre tract valued at $7,444.85 ($551.47 per acre), the values are comparable.

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[3]Interestingly, Exhibits B and C also bears witness to the fact that the assessor revalued "comparable" properties on recent sales occurring between 1975-85. If this were not the case the comparable properties would have only undergone a percentage increase of thirty percent, as those properties not the subject of a recent sale were subject to increases of ten percent on three separate occasions. All of the properties reflect increases in valuation at a greater percentage than 30 percent. Thus, the properties considered comparable by the petitioner were valued by the assessor at that value that the market would bear—as was the petitioner's. The fact that the market would create values of property dramatically different is a reflection of the difference in "actual value" of the property. If the value of these "comparable properties" were in fact found to be worth the value that East Kentucky's property was worth, it is likely that the owners of the "comparable properties" would have opted to sell to a buyer who would pay the higher price, especially where the difference in the price of properties is a factor of millions of dollars.

It is patently ludicrous for petitioners to compare a 13.5 acre tract (upon which no evidence is offered as to coal reserves) with their total acreage of 7287, especially where one portion of that property has proven reserves of 32,000,000 tons of high priced low sulfur coal recoverable by strip mining methods alone. If there was *any* coal on the 13.5 acre tract—a fact *not* established by petitioners—it still would not be comparable because the initial fixed costs of mining would be spread over smaller coal reserves.

The superficial comparison by petitioners of property values is insufficient to prove disparate traeatment where there is no proof that the alleged "comparable" properties were not valued at true and actual value. This case falls squarely within the parameters of *Coulter,* 196 U.S. 599. No clear evidence of underevaluations of others' properties has been shown.

C. The Assessor's Actions Were A Rational And Systematic Methodology To Establish Property Valuations In A Nondiscriminatory Manner.

The assessor's method of valuing property reflects a rational attempt to determine, with limited resources, the true and actual value of real property in Webster County, in accordance with provisions of the West Virginia Code, and in a manner that resulted in neither intentional nor systematic discrimination.[4]

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[4]The assessor's duties are set forth in Section III, herein.

The assessor rationally and systematically utilized three mechanisms in determining the true and actual property value.[5] First, she revalued property when presented with the best evidence of its true and actual value—an arm's-length transaction. She considered information from the Tax Commissioner, but determined that it was inapplicable.[6] Second, she increased the valuation of property that had been improved. (Tr. Feb. 12, 1985, Hearing before the County Comm'n, p. 47) Finally, she made three separate increases of ten percent each on property that had not been recently involved in an arm's-length transaction. The ten percent increases were made based on her knowledge of local conditions and her estimate of the amount of increase necessary to bring the valuation of property that had not been recently sold into alignment with the value of those properties that had been recently sold.[7] (Tr. Feb. 12, 1985, Hearing before the County Comm'n, p. 22.)

The fact that experts may differ as to whether these acts reflected a system of perfect valuation is not re-

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[5]It is well established that mere differences in modes of assessment do not deny equal protection. *Bell's Gap R.R. Co. v. Pennsylvania,* 134 U.S. 232 (1890).

[6] "One year we got [a list from the Tax Commissioner of coal properties in the three districts of Webster County]. . . . We were told the value was for one seam only and that was for the cheapest seam . . . If those things had been true there wouldn't have been [anyone] mining coal. So, she, [a representative from the Tax Department who was a mineral specialist] said that the way we were doing it by using the sale value, [was] proper." (Tr. Feb. 12, 1985, Hearing before the County Comm'n, p. 30.)

[7]Her efforts reflect a continuing effort to reappraise property. Thus, the case is analogous to situations where an assessor makes a partial reappraisal which results in some property receiving higher rates than others. Courts have rather uniformly rejected equal protection and uniformity of taxation arguments in such cases.

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motely indicative of intentional and systematic discrimination. The true and actual value of property is subject to a myriad of market, economic and logistical factors. The value of property in all cases, except where an actual market transaction has occurred, is a matter of opinion and individual estimate. As observed in *Weil v. Supervisor of Assessments*, 266 Md. 238, 254, 292 A.2d 68, 76 (1972), "[v]aluation of land is not an exact science. Experts nearly always differ as to their opinion of fair market value."

The critical determination is not whether this system created perfect valuations, but whether there was intentional and systematic discrimination. The actions of the assessor reflect an effort to accomplish just the opposite.

This was not a case where there was intentional and systematic discrimination, but where the assessor acted within her capacity, as dictated by the West Virginia Code, to avoid discrimination. It was the assessor's duty under the Code to increase assessments for that property where

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In *In re Hawaiian Land Co.*, 53 Hawaii 45, 487 P.2d 1070 (1971) appeal dismissed sub nom. *Hawaiian Land Co. v. Director of Taxation, State of Hawaii*, 405 U.S. 907 (1972), the Hawaiian Supreme Court found that it was not a violation of the equal protection clause where an assessor selected certain properties to be valued annually while others were valued every two or three years. In *Justus v. Bd. of Equalization*, 101 Idaho 743, 620 P.2d 777 (1980), the Idaho Supreme Court found no equal protection or uniform taxation problem where piecemeal reappraisals were made over a period of time with property being assessed at the new appraisal figure instead of waiting until all property had been reappraised. This same result was reached in *Recanzone v. Nevada Tax Comm'n*, 92 Nev. 302, 550 P.2d 401 (1976). See also *Melvin v. Dunn*, 607 P.2d 694 (Okla. 1980); *State ex rel. Fort Howard Paper Co. v. State of Wisconsin Lake District Bd. of Review*, 82 Wis.2d 491, 263 N.W.2d 178 (1978); Annot., 76 A.L.R.2d 1077 (1961).

true and actual values had increased as shown by the purchase price arising from an arm's-length transaction. See W. Va. Code § 11-3-1. Further, the Code mandated that the assessments be increased where the property had been improved. See W. Va. Code § 11-3-3a. To equalize values on property that had not been revalued by virtue of a recent sale, three separate increases were applied. These increases were consistent with her opinion as to the level of inflation during the period in dispute, 1975 to 1985. (There was no evidence presented as to what adjustments were made between the last statewide reappraisal, in 1965, and 1975.) The question that remains is whether the actions of the Webster County assessor in raising the value of property that had not been recently transferred, by 331.1 percent was reasonable. In the time frame of this case, 1975-86, the general market increase in property values in the relevant classification, gross private domestic investment-nonresidential property, was 41.2 percent.[8] Thus, the actions of the assessor reflect a close adherence to actual market changes. The small deviation can be explained by numerous factors.[9]

The assessor's actions must be examined in light of the presumption of validity and good faith in the actions of taxing officials. In *Meyer v. Cuyahoga County Bd. of Revision*, 58 Ohio St. 2d 328, 390 N.E.2d 796 (1979), the Supreme Court of Ohio held that fixing of the true value

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[8]Source: 1988 *Statistical Abstract of the United States*, Table No. 733, Fixed-Weighted Price Indexes: 1970-1986 at p. 446.

[9]The fact that the increases were periodic rather than yearly could cause the actual figure to hit the exact mark if, for example, the assessor were to have increased values by another 10 percent in 1987.

of a parcel of real estate separately and between reappraisals for tax purposes does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, nor the uniform rule as provided in Section 2, Article XII of the Ohio Constitution. In so holding, the court noted that the fair market value of property for tax purposes is a question of fact, primarily to be determined by the taxing authorities. The court recognized that:

> The system of taxation unfortunately will always have some inequality and nonuniformity attendant with such governmental function. It seems that perfect equality in taxation would be utopian, but yet, as a practicality, unattainable. We must satisfy ourselves with a principle of reason that practical equality is the standard to be applied in these matters, and this standard is satisfied when the tax system is free of systematic and intentional departures from this principle.

In consideration of all these factors, the actions of the assessor were not incompatible with a fair system of property valuation, and were not discriminatory or violative of the Equal Protection Clause. See *May Department Stores*, 308 S.W.2d 748.[10]

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[10]Assessor's actions are clearly distinguishable from those cases cited by petitioner. Specifically, *Ernest Hahn, Inc. v. County Assessor*, 92 N.M. 609, 592 P.2d 965 (1978) concerned a case where the taxpayer was singled out for selective enforcement in that it was reappraised four times during an eight year period of an unscheduled continuous reappraisal program while ninety percent of the property did not undergo a single reappraisal. In *Sparks v. McCluskey*, 84 Ariz. 283, 327 P.2d 295 (1958) the assessor selectively applied a new formula to determine value on certain streets. In *Duval v. City of Manchester*, 286 A.2d 612 (N.H. 1971) the disparate treatment was, in part,

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D. The Uniform Reliance By The Assessor On Recent Sales As An Indicator Of Value For Assessment Purposes Whenever These Were Available Was Not In Violation Of The Equal Protection Clause.

The use of recent sales as an indicator of value has been upheld in numerous cases throughout the nation. The use of such sales by the Webster County assessor to revalue petitioner's property was in compliance with the West Virginia Code, supported by the holding below and likewise not violative of the Constitution.

The statutory valuation system adopted by the West Virginia Legislature is similar to that of the majority of states. This system of valuation recognizes that property values do not remain constant, and mandates the valuation of real estate by the most ideal and realistic indicator of true and actual worth—market value. There is an abun-

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caused by the fact that property had not been reappraised for as much as forty years. In *Board of Assessors of Weymouth v. Curtis,* 375 Mass. 493, 378 N.E.2d 655 (1978) the assessor revalued only if improvements were made.

The assessor, in the present case, did not single out a taxpayer for selective enforcement, nor use just one method of adjustment (such as in *Weymouth*) but used three methods to insure that values on property were in alignment.

In *Nashville, Chattanooga & St. Louis Railway v. Browning,* 310 U.S. 362, 368 (1940) the Court stated:

"This Court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of equality which alone the Equal Protection Clause was designed to assure."

dance of authority to support the contention that an arm's-length transaction is the best indicator of value. In *State ex rel. Lincoln Fireproof Warehouse Co. v. Board of Review*, 60 Wis. 2d 84, 208 N.W.2d 380 (1973), the Supreme Court of Wisconsin found that a "fair sale" of property is conclusive evidence of the fair market value of such property for tax assessment purposes. The court declared that it was error to utilize other evidence of intrinsic value in assessing property. Likewise, in *Meyer*, 390 N.E.2d 796, the Ohio Supreme Court noted that it had consistently held that the best evidence of true value was the actual sale price of the property in an arm's-length transaction. *See also, State ex rel. Lincoln Fireproof*, 208 N.W.2d 380.

In *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23 (1931), the Court recognized the merit of utilizing market value. In *Cumberland* the commissioners of the county, sitting as a board of appeal for the revision and equalization of assessments, assigned different values for the coal in different townships of the county, but assessed the coal within the same township at the same value per acre, notwithstanding differences in actual or market value for different coal tracts within the township. The issue before the Court was whether a system of assessing all coal in the same township at the same value regardless of the remoteness or accessibility to market, cost of operation, means of transportation available, or differences in value of the coal, and regardless of whether the coal was virgin coal (as distinguished from "active coal," which is opened and mined), was violative of the Equal Protection Clause. The Court held that the system did violate provisions of the

Equal Protection Clause by virtue of the fact that the system did not recognize differences in actual values.[11]

The petitioner admits that there is nothing inherently wrong with utilizing recent sales as a basis for assessing real property. The petitioner's contention, instead, is that to revalue only property that has been recently sold is a violation of equal protection. It cannot be emphasized strongly enough that the petitioner misstates the facts. The assessor did revalue other property. (See Section IIC, herein) Assuming *arguendo,* however, that no adjustments were made to other properties by assessor, use of recent sales to revalue petitioner's property was proper.

If the assessor had not used her authority to revalue property where there was a clear indication of a "dramatic" increase in value caused by development or an incorrect previous assessment, then a treatment opposite the treatment accorded under the welcome stranger doctrine would have resulted. For example, assume that two pieces of property of equal acreage were valued by the assessor at a time when one piece of property had a home constructed on it, and the other was barren. The assessor valued each piece of property at its actual value; therefore, the first piece was valued at $100,000 while the second piece was valued at $10,000. Thereafter, the second lot was developed to support four homes worth $100,000

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[11]It is of interest to note that the circuit court's decision in this case is violative of the holding of *Cumberland.* The circuit court ordered that petitioner's property be assessed at an estimate provided by the Tax Commissioner as to value per acre. In Webster County this value was to be used as a starting point, not as a conclusive value. Further, the value provided by the Tax Commissioner and used by the circuit court related to a less valuable seam of coal.

each. If an assessor were unable to adjust property values to account for such increases, then the owner of the first lot would be inequitably paying for public services consumed by the new households. An assessor must have the ability to revalue property when presented with undisputed evidence that the property has been developed or is grossly undervalued. Where there is a clear increase in value of property and such property has increased more than land in the surrounding area, state courts of last resort have recognized the need to grant deference to the assessor to account for such increases. *See May Department Stores*, 308 S.W.2d 748.

The property at issue is indicative of the critical need that an assessor revalue when presented with clear evidence through arm's-length transactions that the property warrants revaluation.

Clearly, the petitioner's property either is increased in value because of establishment of "proven reserves," because it had been developed, or because it had been previously grossly undervalued. The mineral resource being taxed was a depletable one. Without a means to revalue the property, the government would have no means of extracting from the owner of the property his share of the costs of governmental services relating to that property. Mineral production is an activity for which the public costs are very high. The production of coal very often results in not only the removal of the mineral in place, but water pollution, land recontouring problems, water table depletion, coal waste disposal and water impoundment problems and land subsidence problems; all of which involve public costs.

E. The Equal Protection Clause Does Not Require The Assessor To Conduct An Extensive County-Wide Reevaluation Merely Because Petitioners' Newly Purchased Property Was Reassessed.

The Equal Protection Clause does not require extensive, expensive, sophosticated valuation systems, nor does it mandate that all property be valued perfectly. Such requirements would place such a heavy burden on state governments that no system of taxation could survive. Instead, the standard is that there be no intentional, systematic discrimination.

The assessor's actions did meet the requirements of the Equal Protection Clause. The West Virginia system provides that when clear evidence is presented to the assessor of the increased value of property, the assessor must recognize such changes. This was done with petitioner's property. However, there was no corresponding duty to perform an exotic and expensive reevaluation of surrounding property merely because petitioner's property was accurately reassessed (contrary to petitioner's assertion). Such a duty would mandate an immediate and unaffordable reappraisal of all properties within the county each and every time a sale of property occurred.

The statutory valuation system, by its nature and practical application, relies on the local assessor's knowledge of local market conditions to determine the value of that property which has not been sold. Unlike the evidence presented by an arm's-length transaction in a recent sale, increases in valuation of property that has not been recently sold are not clearly evident.

As noted in *Shell Oil Co. v. Supervisor of Assessments of Prince George's County*, 278 Md. 659, 366 A.2d 369, 374 (1976), "[n]o one parcel of land is exactly the same as another. Each parcel is unique." Common sense dictates that the increase in the value of one piece of property is not *conclusive* evidence that surrounding property has increased in value.

This rationale is especially applicable in valuing mineral property. The petitioner's own expert indicated that the location of coal deposits varied widely on the subject property. (Res. Br. in Opp. p. 18) Absent expensive mineral exploration procedures, there is no certainty that such coal deposits are present. Obviously, it would be impractical for the assessor to embark upon costly mineral exploration efforts in order to reach some "ideal" value, and such an effort is even less practical if, as the petitioner argues, it should be made every time a property sale occurs within the county. Administrative costs of revaluation is a factor which can be taken into consideration in determining whether the taxing authorities' action meet Equal Protection standards. *See Justus v. Board of Equalization of Kootenai County*, 101 Idaho 743, 620 P.2d 777 (1980).

The assessor did not even have a duty to make a cursory physical inspection of the property and adjacent properties, contrary to assertions by the petitioner. The actual value of the petitioner's property was clearly indicated by the purchase price resulting from the arm's-length transaction. There was no need to evaluate how much coal ex-

isted, the quality of such coal or its proximity to transportation. The market has made such distinctions. For the reasons previously mentioned, an inspection of the surrounding properties would have been fruitless, because it would not have resulted in information sufficient for a coal valuation.

III. ANY DISPARITY NOT REFLECTING TRUE AND ACTUAL VALUE RESULTED FROM THE WEBSTER COUNTY ASSESSOR'S APPLICATION OF A CONSTITUTIONAL CLASSIFICATION OF ASSESSMENT PROCEDURES BY THE STATE.[12]

A. The Court Has Adopted A Deferential Standard Of Review In Determining Whether Distinctions Created By A State Legislature Violate The Equal Protection Clause.

This Court has consistently adhered to a deferential standard of review in applying the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to distinctions created by state taxation leg-

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[12]Petitioners have not, in this Court or below, challenged the constitutionality of the state statutory system. Thus, the issue of the constitutionality of the statutory classification scheme is not before this Court, nor can it be. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). The only equal protection question before this Court is whether the assessor's discretionary acts in this case constituted an intentional and systematic violation of equal protection. These can only be analyzed in the context of the West Virginia statutory classification scheme and it is only for that purpose that it is addressed in this brief.

islation. The distinctions made by the state tax system will be held to rest on a rational basis, and thus not violative of the Equal Protection Clause, if any conceivable state of facts support the distinction. *See Carmichael v. Southern Coal and Coke Co.,* 301 U.S. 495, 509 (1937). It does not impose upon a state any rigid rule of equality of taxation. *Id.* at 495. The test is whether the difference is an invidious discrimination. *See Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359 (1973), see also *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966). The deference accorded issues regarding state taxation is especially broad.

Where taxation is concerned and no specific federal right apart from equal protection is imperiled, the states have large leeway in making classifications and drawing lines which, in their judgment, produce reasonable systems of taxation.[13]

In *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526 (1959), this Court discussed its standard of review in cases involving state systems of taxation:

> The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amend-

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[13]*Lehnhausen,* 410 U.S. 356, noted that classic examples of federal rights concerned those created by the First Amendment or Interstate Commerce Clause.

> ment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.

The Court has sustained state taxes even when they have had the collateral effect of destroying an occupation or business. *See Magnano Co. v. Hamilton*, 292 U.S. 40 (1934). The presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. *See Lehnhausen*, 410 U.S. 356.

The deferential standard used to review state tax statutes recognizes the inherent right of a state to control its governmental functions and the fact that the state legislature is better able to address the conditions and circumstances peculiar to that state than any other tribunal, body or entity.

B. West Virginia Has Classified Certain Evaluative Criteria Which Should Be Given Priority Over All Others.

West Virginia has determined that all property subject to ad valorem tax is to be valued at its "true and actual value."[14] The West Virginia Legislature has codified certain procedures and prioritized certain evidence to be used by county assessors in performing this valua-

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[14]See Constitution of West Virginia, Article X, § 1, Pet. Ap. 70a and W. Va. Code § 11-3-1, Pet. Ap. 76a.

tion.[15] This codification constitutes a constitutional classification related to a combination of legitimate purposes. It, in essence, provides that certain kinds of evidence or data must be considered by an assessor when performing annual valuations. The weight the assessor must give to this evidence is largely, but not entirely, left to the assessor's discretion.

First and foremost, W. Va. Code § 11-4-8 requires an assessor to use the purchase price of recently transferred property to establish true and actual value.[16] This requirement expresses the statutorily mandated preference that relevant cost data generated through an arm's-length transaction be included when establishing the true and actual value of a given taxpayer's property.[17]

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[15]See Constitution of West Virginia, Article X, § 1b, W Va. Code § 11-3-1 *et seq.*, W. Va. Code § 11-4-1 *et seq.*, and W. Va. Code § 18-9A-11.

[16]W. Va. Code § 11-4-8 provides in pertinent part:

"The clerk of the county court [county commission] shall, not later than the tenth day of each and every month, make out and deliver to the assessor a certified list showing all the transfers of title of land made in his county during the preceding month; such list shall show * * * the names of the devisors and devisees, the names of the grantors and grantees, * * * the nature of the estate transferred, the character of interest in the land conveyed, the quantity and location of the land or interest transferred, and, if a part of a tract, of what tract it was a part when the whole tract was transferred, and reference to the book and page showing such transfer. From the list thus furnished, the assessor *shall* make the necessary changes in the land books for the current year, and *shall* value each tract of land or interest therein so transferred, at its true and actual value according to the rule established in this chapter. . . ." (Emphasis added)

[17]Inasmuch as W. Va. Code § 11-3-1 mandates that an assessor value the property at "the price for which such property would sell if voluntarily offered for sale," then *a fortiori* wher

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Reading these statutes in *pari materia*, a reasonable assessor, when confronted with this evidence, must accept arm's-length cost data as the "true and actual value" of the transferred property at the time of the transaction unless she has received other competent evidence to the contrary. Failure to do so would be an arbitrary and capricious act of the assessor.[18]

Second, W. Va. Code § 11-3-3a mandates that the assessor be provided notice of any improvements to real property that exceed $1,000.[19] The weight given to such evidence is left to the discretion of the assessor, but the assessor is specifically authorized by statute to use it.

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confronted with such a "voluntary" sale, the value as set forth in the "declaration of value" constitutes, at the time of the sale, the value at which the assessor should value property. W. Va. Code § 11-4-8 and W. Va. Code § 11-22-6. A failure to file an accurate "declaration of value," when property is purchased, is a crime punishable by imprisonment up to five (5) years and/or a fine of up to $1,000. See W. Va. Code § 11-22-9.

[18]*Kline v. McCloud*, 326 S.E.2d 715 (W. Va. 1984)

[19]W. Va. Code § 11-3-3a provides in pertinent part:

"Any person, corporation, association or other owner of real property, subject to the payment of property tax, who shall hereafter erect any building or structure, or who shall add to, enlarge, move, alter, convert, extend, raze or demolish any building or structure, whereby the value of the said real property shall be improved more than one thousand dollars, shall give notice in writing to the assessor within sixty days after the commencement of the improvement of such property . . . The information contained in such notice shall be advisory in nature and may be used by the assessor in performing his duties as otherwise provided by law. . . ."

Third, W. Va. Code § 18-9A-11(c) mandates that the Tax Commissioner's latest appraisal information be made available to the county assessor on a yearly basis. (Pet. App. p. 82a.) While an assessor may take this appraisal information into consideration, the subsequent price paid for property in an arm's-length transaction may not be rejected in favor of it.[20]

It is the general duty of an assessor, using the statutory methods and criteria set out above, to assess all property based on its true and actual value on July 1 of each year. There is no statutory list of any other evidence or criteria which should be given priority by assessors in the exercise of their professional discretion.

As applied, assessors do not crisscross the county each July 1, reevaluating all property. Rather, the assessor generally evaluates market trends and makes general adjustments in property value. This application of the statute reflects the fact that assessors do not possess the needed resources or expertise to perfectly evaluate each piece of property annually, especially when such reevaluation would require core drillings and assessment of mineral reserves.

This statutory prioritization of evaluative evidence and criteria is state policy and constitutes a constitutionally permissible classification scheme. It classifies, on one hand, evidence that cannot or should not be ignored by the county assessor and the Board of Equalization and Review, and on the other hand, all other criteria and evidence which are left to the discretion of the assessor.

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[20]*Kline*, 326 S.E.2d 715.

C. This Classification Is Rationally Related To A Number Of Legitimate But Competing Public Purposes.

The distinctions created by West Virginia's taxation legislation are rationally related to the furtherance of the legitimate public pupose of obtaining tax revenues needed for county governments and school districts;[21] while at the same time assuring compliance with equal protection between taxpayers and due process between the state and the individual taxpayers.[22]

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[21]Pursuant to 11-8-6b, county commissions' maximum levy rates are as follows: Class I property, 11.9 cents; on Class II property, 23.8 cents; Class III and IV property, 47.6 cents; per hundred dollar valuation.

Pursuant to 11-8-6c, county boards of education maximum levy rates are as follows: Class I property, 21.1 cents; Class II property, 42.2 cents; Class III and IV property, 84.4 cents; per hundred dollar valuation.

[22]Under the Fourteenth Amendment, "due process" emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated; "equal protection," on the other hand, emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable. *Ross v. Moffitt*, 417 U.S. 600 (1974).

1. **In furtherance of the first purpose, West Virginia has a system that is designed to insure that whenever a property increases in true and actual value, if inexpensive and reliable evidence of that value is available, it is used. This purpose can be restated as an attempt to realize maximum legitimate tax revenue per administrative cost.**

The declaration of consideration of an arm's-length transaction constitutes historical cost data that is highly probative of the true and actual value of that property at the time of the transfer. A statutory system that directs the assessor to include *all* such data for *all* property is not only reasonable, it comports with general accounting principles.[23]

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[23]"Accounting has traditionally accepted historical cost as the primary measurement base, in spite of serious challenge from various fronts, such as the Securities and Exchange Commission, which currently requires the disclosure of some current value information. A major defense of historical cost is that it represents prima facie evidence of the objectively determined value of resource or obligation. At the time of acquisition, historical cost is the same as current market value at a point in time as suggested by an arms-length transaction. Because the measure of value is determined by an exchange transaction, it can be measured independently (*i.e.*, it is verifiable), and provides a degree of objectivity often lacking in other measurement bases. The emphasis on objectivity determined values supports the historical cost concept of income determination, which generally recognizes changes in value only if they are evidenced by an exchange transaction (*i.e.*, a new historical cost or acquisition price is established).

"Historical cost is also supported on the grounds that it has a utility for predictive purposes. The relevance of historical costs to certain types of future economic decisions, including those which involve future predictions, is established in the literature." [Footnote omitted] Fischer, Taylor, Lee *Advanced Accounting*, pp. 9-10 (1st ed. 1978).

(Continued on following page)

Thus, the Webster County assessor was implementing a statutory system reasonably designed to insure that all increases in true and actual value must be taxed whenever there is evidence of such increase.

2. The classification system is also designed to satisfy the requirements of equal protection.

When property valuations are adjusted for inflation (as anticipated by the statutory scheme and done by the assessor, below), there will be no systematic discrimination between property recently sold and that which was not sold. Any differences in true and actual value would result from specific differences between tracts. Specific facts that might result in such differences, such as whether or not there is a proven underground reserve of mineable coal, are often not reasonably discoverable by an assessor, except as reflected in a recent sales transaction.

(Continued from previous page)

"The cost principal is a pervasive concept that affects most aspects of financial accounting. *Cost* (or *historical cost*) is assumed to be the proper basis of accounting for assets acquired, for services received, and for the interests of creditors and owners of a business entity. . . . At the time of the transaction, the exchange price usually represents the current fair value of the goods or services exchanged as evidenced by the agreement of an informed buyer and seller." Meigs, Mosich, and Johnson, *Intermediate Accounting*, p. 16 (4th ed. 1978).

"Why are assets and services recorded at cost? The answer is that accounting must be factual and costs are factual. When costs are used, a buyer and seller, each trying to strike the best bargain for himself, establish the costs; and these 'bargained costs' are normally a fair measure of the goods and services acquired. If amounts other than costs were used, for example, accounts based on estimates, judgments, and appraisals, accounting records would lose much of their usefulness." Pyle & White, *Fundamental Accounting Principles*, p. 9 (7th ed. 1975).

A rational and administratively sound decision to uniformly and systematically forego exotic and expensive evaluation techniques which are not mandated by statute, such as core drillings used to determine whether proven reserves of mineable and merchantable coal might be present in each parcel of property, would be an exercise of discretion left to the assessor by West Virginia's statutory scheme. As discussed in Section II herein, the uniform unavailability of such data is not discriminatory and therefore not violative of equal protection.

Further, the statutory scheme under which the assessor acted subjects all properties to the same evaluative criteria. All properties are assessed as true and actual value.

All properties are appraised and assessed taking into consideration any evidence of changed value, such as recent deed values.

All taxpayers, believing their property to be overvalued or their neighbor's property to be undervalued, have standing to challenge that valuation.[24]

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[24]See the holding of the West Virginia Supreme Court of Appeals below, Pet. Ap. 8a, 9a, where they stated in relevant language:

"Any dispute the appellees have with the assessments of other landowners in Webster County may be presented to the board of review. '[A]*ny* person who is aggrieved by *any* assessment shall have the right to appeal that assessment (if they have appeared and contested the valuation before the Board of Equalization and Review).' *Tug Valley Recovery Center, Inc. v. Mingo County Comm'n,* 164 W. Va. 94, 101, 261 S.E.2d 165, 170 (1979). (emphasis in original).

(Continued on following page)

If, after a hearing, it is determined on sufficient competent evidence that in a particular instance the valuation was inaccurate, under West Virginia law, the erroneous valuation not only can, but must be corrected.[25]

(Continued from previous page)

"In *Tug Valley, supra,* we found support for this position in both *W. Va. Code,* 11-3-25, which holds, in part:

'Any person claiming to be aggrevied by any assessment in any land or personal property book of any county who shall have appeared and contested the valuation or whose assessment has been raised by the county court [county commission] above the assessment fixed by the assessor, or who contested the classification or taxability of his property may, at any time up to thirty days after the adjournment of the county court [county commission], apply for relief to the circuit court of the county in which such books are made out . . .

and *W. Va. Code,* 18-9A-11 which holds in part:

'In the event the county commission shall fail or refuse to make the reallocation of levies as provided for herein, the county board of education, the tax commissioner, the state board, or any other interested party, shall have the right to enforce the same by writ of mandamus in any court of competent jurisdiction.

'We concluded that' [t]his language makes it clear that 'any interested party' is allowed to compel proper assessment of all real estate in his home county. . .' *Tug Valley, supra,* at 101, 261 S.E.2d at 170.

'We addressed the very question raised by appellees in *Killen, supra,* and held at —, 295 S.E.2d at 709: 'In the future, taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced *as long as their property is valued at market value.* Instead, they should seek to have the assessment of other taxpayers raised to market value.' (emphasis added)."

[25]W. Va. Code § 11-3-25 states in relevant part: "If it is ascertained that any property is valued too low the circuit court shall, by an order entered of record, correct the valuation and fix it at its true and actual value." (Pet. Ap. p. 79a.)

3. Finally, the State's assessment system is a rational means of assuring that there is fairness between the state and the individual taxpayer dealing with the state.

West Virginia recognizes that each parcel of land is unique. See *Shell Oil*, 366 A.2d 369. Rather than encourage large or reckless increases in the assessed value of property which was presumed to have been accurately assessed in the previous tax year, W. Va. Code § 11-2-2a specifically provides that "if the assessor determines the assessed valuation of any item of real property is more than ten percent greater than the valuation assessed for this item in the last tax year . . . the assessor shall give notice of the increase to the person assessed . . . ."

This procedure protects the right of the individual taxpayer not to have his property valuation increased without due process.

As discussed in Section II, the mere fact that one property adjoins another that is assessed significantly higher, is not sufficient to sustain a conclusion that it has the same or similar true and actual value. Nor would reliance on only such evidence sustain a due process challenge by an individual taxpayer whose tax burden was increased only because of such facts.

The class of evidence which, according to West Virginia's statutory scheme, must be given priority by an assessor is small and includes only highly probative and reliable indicia of true and actual value. This restraint protects the rights of individual taxpayers under the due process clause of the Fourteenth Amendment.

IV. THE REMEDY SOUGHT BY THE PETITIONER SHOULD NOT BE ADOPTED IN THE PRESENT CASE.

A. Where No Systematic and Intentional Discrimination Exists, The Holding That a Taxpayer is Not Entitled to a Reduction of His Assessment But May Object to Other Taxpayers' Value to Achieve More Perfect Equality Does Not Violate the Equal Protection Clause.

The court below found that there was no evidence of intentional and systematic discrimination. The court went on to state that even if it had been found that the petitioner had been a victim of such discrimination by the acts of the Webster County assessor, the court enunciated the appropriate remedy: to raise other taxpayer's taxes in accordance with appropriate valuation. This holding recognizes that there is nothing inherently wrong in forcing a taxpayer to pay his fair share, especially where the assessor implemented valuation increase in order to equalize property valuations within the county.

In *State Tax Comm'n v. Brandt Cabinet Works*, 202 Md. 533, 97 A.2d 290, 295 (1953), the Maryland Supreme Court held:

> Perfect equality is unattainable. If assessments could be upset by comparison of a few widely different properties, on the basis of a selected few of the many elements or evidences of value, no assessment could stand. . . . Every taxpayer has a financial interest in seeing that all property in the state, properly the subject of taxation, should be taxed, because, by increasing the taxable basis, the rate necessary for the production of the expenses of the state and local governments will be reduced, and the individual's tax correspondingly lowered.

The West Virginia Court has previously fashioned a remedy of lowering taxes where a taxpayer was intentionally singled out. In *In re U.S. Steel Corp.*, 268 S.E.2d 128 (W. Va. 1980), the court held that the assessor acted arbitrarily and capriciously when he fixed the assessed value of U.S. Steel's property at 108 percent of its appraised value but assessed other coal companies' property at 68 percent over value assigned by them in their reports. The court found that this was not a sporadic deviation from the system, but a negation of the system, because there was evidence of knowing, active discrimination against the steel company. The court held that where there was *intentional* discrimination against the taxpayer, by knowingly applying a different formula to the computation of its taxes from that generally used for *all* other taxpayers in similar circumstances, the taxpayer is entitled to have its taxes computed in the same manner and on the same basis as the favored taxpayers.

To this extent, *In re U.S. Steel Corp.* resembled the situation in *Sioux City*, 260 U.S. 441.

In *Sioux City* the Court held that where there is *intentional* and systematic valuation at different percentage rates of other property in the same class, the remedy is for the taxpayer to have its taxes assessed at the same rate in the same manner as the other taxpayers.

The case before the Court is clearly distinguishable. The petitioner was not singled out. All property was valued by using available evidence of recent transactions and thereafter uniform rates were applied.

The facts of *Sioux City* are further distinguishable. Even where there is not intentional and systematic discrimination, there is available, in West Virginia, a statutory procedure to secure an increase in the assessment

of an adjacent property that may be undervalued. Under West Virginia law, sufficient and credible evidence of "comparable" value or of undervaluation will sustain a judicial finding that a property or properties have been undervalued and should be increased. West Virginia law not only provides standing to petitioners to challenge specific suspect valuations, it provides that the circuit court must increase any undervaluations and therefore increase their assessment.[26]

B. Assuming, Arguendo, That All Of Petitioner's Arguments Are Correct, The Only Appropriate Remedy Is To Remand The Case To State Court For The Fashioning Of A Constitutionally Permissible Remedy.

The gist of petitioner's argument is that the remedy fashioned by the West Virginia Supreme Court of Appeals impermissibly shifts the burden to petitioners to seek to have others' taxes increased. The remedy allegedly violates the Constitution because the *burden* for raising the taxes rests upon the petitioner. The Court noted in *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931) that the taxpayer "cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." *Id.* at 247. Assuming, *arguendo*, that petitioners are correct, then the remedy fashioned by the state court violates the Fourteenth Amendment. This Court need not fashion a remedy because other remedies are possible through utilization of state law.

Several possible remedies could be fashioned by the state court utilizing state statutes. For example, W. Va.

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[26]See Footnote 25.

Code § 11-3-1 provides that in the event assessor fails in his duty, then the State Tax Commissioner may take over the tax responsibilities in that particular county. (Pet. Ap. p. 76a) Additionally, the assessor could be ordered to reassess all the property. *See State ex rel. Rose v. Fewell*, 294 S.E.2d 434 (W. Va. 1982). The West Virginia Supreme Court of Appeals could order implementation of the statewide reappraisal as provided for in the 1982 Amendment to the West Virginia Constitution.

It is well settled that "the Court will not pass upon a (federal) constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (Brandeis, concurring).

> Although federal courts generally have a duty to adjudicate federal questions properly before them, this Court has long recognized that concerns for comity and federalism may require federal courts to abstain from deciding federal constitutional issues that are entwined with the interpretation of State law. *Brochett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O'Connor, concurring).

Accordingly, this Court can avoid enumerating a constitutionally mandated remedy by remanding the case back to state court to allow the state court to fashion a remedy through the utilization of state law in accordance with the appropriate federal standard. This is the only appropriate holding. *Rescue Army v. Municipal Court*, 331 U.S 549 (1947).

———o———

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Appeals that the petitioners' properties were assessed in accordance with the Equal Protection Clause of the United States Constitution should be affirmed.

Respectfully submitted,

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Nos. 87-1303, 87-1310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
WEST VIRGINIA,
Respondent.

EAST KENTUCKY ENERGY CORPORATION,
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Writs of Certiorari to the Supreme Court of Appeals of West Virginia

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On Writs of Certiorari to the Supreme Court of Appeals of West Virginia

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JOINT REPLY BRIEF FOR PETITIONERS [1]

Respondent the County Commission of Webster County ("the County") begins its brief with factual allegations that run directly contrary to facts to which the County itself *stipulated*, and which were found by the trial court to be fully supported on the record. The County then perversely contends that petitioners failed to prove the very facts to which the County had stipulated.

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[1] Pursuant to S. Ct. Rule 28.1, petitioners note that there have been no changes in their prior listings of parents, subsidiaries, and affiliates. *See* Pet. Br. ii.

Moreover, the County does not identify a single legitimate state interest supposedly advanced by the dramatic disparities in assessment of comparable properties shown on this record and the deliberately adopted policy that caused them. Indeed, it is not until page 29 of its brief that the County refers to legitimate public purposes at all, arguing there that "[t]he distinctions created by West Virginia's taxation legislation are rationally related" to raising revenue—a fact which, whether or not true, is wholly beside the point.

Petitioners have no quarrel with West Virginia constitutional or statutory provisions governing real property taxation, because these provisions do not embrace the "welcome stranger" doctrine but instead mandate assessment of all property on the basis of "true and actual value." Petitioners' property was assessed on that basis. The problem—and what this case is about—is that what the County stipulated to be "neighboring, comparable properties" in Webster County [2] are *not* assessed on that basis, but at dramatically lower levels. This discrimination—this failure to treat those similarly situated in a similar manner—is the direct result of the Assessor's deliberate decision to rely on market prices to assess property subject to recent sale while, as the Assessor herself testified, other properties "are just carried on the books at what they have been in the past." [3]

A. Petitioners' Property Is Comparable To Surrounding Properties Assessed At Much Lower Levels

The basic thrust of the County's argument before this Court is that petitioners' property and the neighboring parcels to which it was compared are not comparable, that the disparities in assessment of from 32-to-1 to

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[2] R. 1320: Stipulation (Feb. 10, 1984), ¶ 8; R. 1086: Stipulation (Feb. 15, 1984), ¶ 12.

[3] R. 2555: Tr. of Feb. 15, 1982, at 9 (Webster County Assessor Winefrede Skidmore).

35-to-1 for the Allegheny Pittsburgh-East Kentucky Energy property and from 8-to-1 to 20-to-1 for the Oneida-Shamrock property were based on "actual differences between petitioner's property and surrounding property." Resp. Br. i. The County *stipulated* to the opposite below; the County Assessor testified that the disparities in assessment were *not* based on any distinguishing characteristics of petitioners' property; the Circuit Court expressly found that petitioners' property and the neighboring parcels were in fact comparable; and the record abundantly supports that factual finding. It is far too late for the County to attempt to retry the facts before this Court.

1. *The stipulations.* On February 10, 1984, and February 15, 1984, counsel for the County and counsel for East Kentucky Energy and Allegheny Pittsburgh signed and filed stipulations with respect to petitioners' actions. The stipulations were formally accepted by the County Commission, and in fact entered as part of the Commission's orders in this case.[4] Each stipulation specified that "[t]he properties surrounding the property owned by your Petitioner, located on Exhibit A and listed on Exhibit B *are comparable properties* in that they are *substantially the same geologically* as the properties of the petitioner, the subject matter of this action."[5] Each stipulation also referred to the properties on Exhibit B as the "neighboring, comparable properties."[6] The dramatic disparities in assessment established on this rec-

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[4] The stipulations may be found in the Record before this Court at R. 1083-88, 1318-22. They were admitted by the County Commission at R. 1081-82, 1454-55.

[5] R. 1319-20: Stipulation (Feb. 10, 1984), ¶ 6 (emphasis supplied); R. 1085: Stipulation (Feb. 15, 1984), ¶ 10 (emphasis supplied).

[6] R. 1320: Stipulation (Feb. 10, 1984), ¶ 8; R. 1086: Stipulation (Feb. 15, 1984), ¶ 12.

ord are based, in part, on comparison of the Exhibit B properties with petitioners' property. The stipulations establish that this is a valid comparison, and the County distorts the record in now arguing the contrary.

2. *The Assessor's testimony.* The County argues before this Court that the assessment of petitioners' property at levels many times that of the neighboring parcels "was merely a reflection of the uniqueness of petitioner's property when compared to surrounding properties." Resp. Br. 9. But that is not what the County Assessor swore to below: "Upon examination, the assessor did not contend that petitioners' assessment was the result of unique or valuable features peculiar only to petitioners' land." Pet. App. 30a; EKE Pet. App. 59a. Of course, even if the Assessor had viewed the properties, she would not have found any uniqueness explaining the disparities in assessment—the properties were, after all, stipulated to be "comparable" and "substantially the same geologically." But the Assessor admitted that she in fact "did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." Pet. App. 29a; EKE Pet. App. 59a.

3. *Factual findings below.* The trial court, after meticulously considering the voluminous record, specifically found that petitioners' property and the parcels assessed at a much lower level were in fact comparable. The court found that "petitioners' real estate is substantially similar to the real estate of the others in topography, location, access, development, mineral content and forestation, and that the petitioners' real estate is substantially similar to adjacent and contiguous tracts and parcels of real estate owned by others." Pet. App. 16a; EKE Pet. App. 50a. The court noted that:

> In addition to Exhibits B, C and G the parties stipulated and agreed to the admission of Exhibit A,

> a map showing the real estate of the petitioners and that used as comparables in Exhibits B and G. From Exhibit A it is obvious that the real estate of the petitioners and that of contiguous, adjoining and adjacent landholders to which it is compared is substantially the same. [Pet. App. 29a.]

As to the alleged hidden value of petitioners' property, the court specifically found that:

> The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon the [comparable] properties.
>
> The questioned assessments were not based upon present use or immediately foreseeable economic development of petitioners' real estate. The assessor did not consider the size, shape, locations, access, or availability of public highways, sewers, water, gas or electricity in assessing either the petitioners' real estate or the * * * comparables. [Pet. App. 29a; EKE Pet. App. 59a.]

These detailed findings establish comparability beyond doubt, confirming what the County had already stipulated. In particular, they establish that the disparate assessments "were not based upon the presence of economically minable or removable coal * * *." The findings also clearly refute the suggestion of amici National Association of Counties, *et al.* (a suggestion not endorsed by the County) that the properties may be somehow distinguishable even if geologically the same. *See* Nat'l Ass'n Br. 18-19.[7]

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[7] The West Virginia Supreme Court of Appeals in no way disagreed with the stipulation or findings on comparability, referring to petitioners' concern "with the undervaluation of comparable Webster County properties" and discussing petitioners' "evidence of the assessed value of comparable properties." Pet. App. 5a.

The trial court's findings on comparability were fully supported by evidence in the record, including maps, testimony, and valuation studies.[8] The County now argues that the alleged presence of 32 million tons of coal on the Allegheny Pittsburgh-East Kentucky Energy property explains the difference in assessments. But the Assessor herself flatly contradicted this by testifying that she took no such factors into consideration in setting the assessments. *See* Pet. App. 29a, 30a; EKE Pet. App. 59a. In any event, the record confirms that the properties are "substantially the same geologically,"[9] as the County stipulated and as the expert witness Mullenex testified.[10]

B. The Assessor Did Not Increase the Assessments of Other Unsold Properties in the Manner Claimed by the County

At several points in its brief, the County relies upon the alleged fact that the Assessor raised the assessed values of properties not subject to sale by 10 percent in

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[8] The County claims inadequate evidence of comparability. *See* Resp. Br. 6. The County's lawyers surely cannot be permitted to stipulate to comparability below and then turn around before this Court and claim that petitioners have not adduced adequate evidence on that score. The County attempts to reconcile its inconsistency by simply ignoring the stipulations—they are not even mentioned in the County's brief.

[9] R. 1319-20: Stipulation (Feb. 10, 1984), ¶ 6; R. 1085: Stipulation (Feb. 15, 1984), ¶ 10.

[10] *See* Resp. Opp. Cert. App. 10a, 19a, 25a. Contrary to the County's suggestion, Mullenex concluded—on the basis of actual coal borings of certain properties listed among the Exhibit B comparables—that those properties generally contained "the same seams" and "mineable seams, very much the same mineable seams that occur on the Eastern Kentucky Energy property." *Id.* at 10a, 19a. There has been no mining of the East Kentucky Energy property.

The County's reliance on coal on the Allegheny Pittsburgh-East Kentucky Energy property is wholly irrelevant in explaining the disparity in assessment of the Oneida-Shamrock property.

1976, 10 percent in 1981, and 10 percent in 1983. *See* Resp. Br. 3, 13, 15. Indeed, the County goes so far as to claim that petitioners do not dispute this assertion. Resp. Br. 3. In fact, however, petitioners not only disputed the claim—as the court below expressly recognized, *see* Pet. App. 6a—they refuted it.[11] The record unambiguously demonstrates that the Assessor did not raise the assessed values of comparable unsold property in the manner claimed by the County. The Circuit Court expressly found that such increases that did take place were so insignificant that, if they were continued, it would take well over *500 years* for the assessment of the unsold comparables to catch up with the assessment of the Allegheny Pittsburgh-East Kentucky Energy property. Pet. App. 28a; *see* EKE Pet. App. 58a.

A study of the change in the assessed value of all coal tracts in Webster County from 1983 to 1984 was introduced in evidence, demonstrating that there was certainly no across-the-board 10 percent increase, as claimed by the County. The study—which was not contested by the County—showed that only 5 percent of the tracts were increased 10 percent, 18 percent were increased less than 9 percent, and fully 35 percent were unchanged. A large number of tracts received a flat $10 increase, not a 10 percent increase. EKE Pet. App. 56a.[12]

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[11] There is no excuse for the County's misstatement to this Court that this point was not disputed. The issue was hotly contested before the trial court, *see* Pet. App. 27a-28a; EKE Pet. App. 56a, and before the Supreme Court of Appeals. *See* Pet. App. 6a. It was also disputed at the petition stage before this Court. *Compare* Resp. Opp. Cert. 13 *with* Pet. Reply Br. 3 n.2.

[12] The Exhibit B chart of comparables also demonstrates the falsity of the County's contention. For example, not one of the comparables showed a 10 percent increase in 1976. Pet. App. 22a. The Circuit Court found that "the appraised and assessed values of coal properties in Webster County have not been materially changed or revalued for the years 1981 through 1986, both inclusive." EKE Pet. App. 84a.

It is evident that the occasional and sporadic *de minimis* increases in the assessment of unsold properties in the County did little to ameliorate the dramatic disparities caused by the Assessor's adherence to the "welcome stranger" policy. The Circuit Court expressly found that from 1975-1984 the properties stipulated to be comparable to the Allegheny Pittsburgh-East Kentucky Energy property increased a scant 0.017 percent of the increase in the latter property—hardly comparable treatment. Pet. App. 28a. The increase in the assessment of the Allegheny Pittsburgh-East Kentucky Energy property over that period was, on a weighted rate per acre basis, *5,672.56 to 6,511.06 percent* in excess of the increase in the comparables on the same basis. Pet. App. 40a. Whatever steps the Assessor took with respect to unsold properties in Webster County did nothing to cure the unconstitutional discrimination established on the record.[13]

C. Consideration of Petitioners' Property as a Whole or Parcel-by-Parcel Does Not Alter the Record of Patently Unconstitutional Discrimination

The County begins its brief with a new factual argument not raised in either court below. According to the County, the startling disparities shown on the record can be explained away by treating the Allegheny Pittsburgh-East Kentucky Energy property as 19 separate parcels

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[13] There is an unfortunate typographical error in the County's brief that may mislead the Court if not corrected. On page 15 of its brief, the County asks "whether the actions of the Webster County assessor in raising the value of property that had not been recently transferred, by *331.1 percent* was reasonable" (emphasis supplied). The County evidently meant the underscored figure to be 33.1 percent—as on page 3 of its brief—reflecting the mathematical result of the hypothesized three consecutive 10 percent increases. As noted above, the 33.1 percent figure is as fictitious as the erroneously transcribed figure, since the record establishes that in fact there were not three consecutive 10 percent increases.

rather than a single unit, and treating the Oneida-Shamrock property as 6 separate parcels rather than a single unit. Resp. Br. 1-3.[14]

The argument with respect to Oneida-Shamrock can be disposed of quickly. The County takes Oneida to task for "fail[ing] to disclose that its 'homogeneous' contiguous tract of 7783 acres consists of six tracts that have assessed values varying from a low of $50.00 per acre to a high value of $560.00 per acre." Resp. Br. 1. Oneida did not disclose this because it is not true. The only Oneida-Shamrock property at issue in this litigation consists of *two* parcels, each with precisely the *same* assessed value of $376.95 per acre.[15] The County's error is evi-

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[14] The County did not raise this argument in either court below. Indeed, the County consistently treated the Allegheny Pittsburgh-East Kentucky Energy property as a single unit and the Oneida-Shamrock property as a single unit. *See, e.g.*, Brief of the County Commission before the West Virginia Supreme Court of Appeals, at 23, 24 ("the property was purchased for Twenty four million dollars on the open market in 1974"; "East Kentucky Energy acquired the property"; "this is a valuable piece of property"). *See also* Resp. Opp. Cert. 2. The County's new argument cannot be raised for the first time here. *See, e.g., Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980) (declining to address issue raised by respondent because "[o]rdinarily, we will not consider a claim that was not presented to the courts below"); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (prevailing party may "defend its judgment on any ground *properly raised below* whether or not that ground was relied upon, rejected, or even considered" below) (emphasis supplied); *United States* v. *New York Telephone Co.*, 326 U.S. 638, 651 n.18 (1946) ("whatever its merits," point not made by appellee until case reached this Court will not be considered).

[15] *See* EKE Pet. App. 52a (Oneida-Shamrock "at all times relevant herein, are the owners of three thousand seven hundred (3,700) acres of coal in Glade District and four thousand eighty three (4,083) acres of coal in Holly District, Webster County, West Virginia, in the aggregate seven thousand seven hundred eighty three (7,783) acres of coal"). The two parcels were jointly owned by Mr. and Mrs. Preston W. Carroll prior to sale as a package to Shamrock, and were conveyed in one deed. *See* Pet. App. 52a.

dent from its own chart on page 2 of its brief. That chart purports to list the "six tracts which comprise this 7,783 acres," listing first the 3,700 acre tract and last the 4,083 acre tract. These two tracts alone add up to the 7,783 acres. In between the County lists four tracts that have never been at issue in this litigation, and obviously do not comprise the 7,783 acres. As the County's own chart reveals, the two tracts that do comprise the 7,783 acres have precisely the *same* assessment per acre; there is *no* variation in assessment whether the Oneida-Shamrock property is considered as a whole or as two separate parcels. This is because the Assessor treated the property as a single unit and simply distributed the purchase price evenly over the 7,783 acres.

The County's new argument is no more valid with respect to the Allegheny Pittsburgh-East Kentucky Energy property.[16] The property was conveyed as a single unit from Allegheny Pittsburgh to East Kentucky Energy in 1982 in a single deed. Pet. App. 3a, 18a. Allegheny Pittsburgh had acquired the property in 1974 in three deeds from a single owner (Raymond C. Desrosier) and a fourth from Raymond and his three brothers, doing business as the Desrosier Brothers. *See* Pet. App. 18a-19a.

The County's new argument also overlooks the fact that the trial court carefully took possible distortions caused by the size of the various constituent parcels into account in conducting the pertinent comparisons. *See, e.g.*, Pet. App. 19a, 21a, 23a. Indeed, the court expressly

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[16] The County's suggestion that Allegheny Pittsburgh and East Kentucky Energy "failed to disclose" that their property was composed of separate parcels is wholly unfounded. Petitioners themselves compiled and introduced the exhibit below listing their property as separate parcels—Exhibit C—which was featured in the trial court decision. *See* Pet. App. 20a. *See also* AP Pet. 3 (Allegheny Pittsburgh "purchased numerous tracts of real estate located in Webster County").

declined to order adjustments in the assessments of 5 parcels owned by petitioners, in part because of "the small size of said parcels." Pet. App. 46a. The court's findings were thus made with any possible distinctions affecting value fully in mind.

Even if the Allegheny Pittsburgh-East Kentucky Energy property is now to be viewed as 19 discrete parcels, the discriminatory effects of the "welcome stranger" approach are apparent. While the County now finds it objectionable to compare the *average* assessment of the Allegheny Pittsburgh-East Kentucky Energy property with the average assessments of the comparables, consideration of *median* assessments yields similar startling disparities.[17]

In 1975 the median Allegheny Pittsburgh parcel in size (parcel 5 on Exhibit C, Pet. App. 20a) was assessed at $35.49 per acre. The median assessment among the 19 parcels (parcels 4 and 14) was $25.00 per acre. In 1975 the median comparable parcel in size (parcel 4 on Exhibit B, Pet. App. 22a) was assessed at $34.99 per acre. The median assessment (parcel 9) was $33.09 per acre. Thus, prior to the Assessor's taking into account the purchase by Allegheny Pittsburgh, the comparables and petitioners' parcels were assessed on similar bases.

After the changes in assessment instituted in 1976 and 1977, the *highest* assessment on any of the comparables (parcel 2) was $53.68 per acre. By contrast, the *lowest* assessment on any of the Allegheny Pittsburgh parcels (parcel 2) was $59.89 per acre, and that assessment was 4 times lower than the next lowest assessment among the remaining 18 parcels (parcel 18, assessed at $247.06 per acre). After the 1976 and 1977 adjustments, the assess-

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[17] The use of median comparisons eliminates any possible distortion caused by allegedly unique parcels "skewing" a comparison based on averages. *See* I.R. Vesselo, *How to Read Statistics* (1962), at 92.

ments on the comparables ranged from $20.00 per acre to $53.68 per acre. By contrast, the range for the Allegheny Pittsburgh parcels in 1976 was from $59.89 per acre to $4,516.13 per acre. If one excludes the highest and the lowest assessments among the 19 Allegheny Pittsburgh parcels, the range narrows somewhat to a low of $247.06 per acre and a high of $2,669.49 per acre. And even excluding from consideration the 5 smallest parcels that Allegheny Pittsburgh purchased, and parcel 2, which respondent asserts is uniquely valuable, the range of assessments remains from a low of $247.06 per acre to a high of $735.00 per acre.

The *lowest* assessment in that range is more than 4 times higher than the *highest* assessment on the comparables. The highest assessment among the Allegheny Pittsburgh parcels (even after excluding from consideration parcel 2 and all parcels of less than 5 acres in size) was more than 13 times higher than the highest assessment on any of the properties stipulated by the County to be comparable, neighboring, and substantially the same geologically.

After East Kentucky Energy purchased the property, the median parcel in size was assessed at $543.35 per acre. The median assessment (on a 1,335 acre parcel) was $539.04 per acre. By contrast, among the comparables, the median parcel in size was assessed at $60.45 per acre. The median assessment (which was applied to 3 separate parcels) was $60.50 per acre. In other words, even excluding consideration of the allegedly "unique" parcel which the County asserts "skewed" the average, petitioners' parcels were assessed on a median basis approximately 9 times higher than the comparable properties.

To consider parcels of approximately the same size, East Kentucky Energy's 4,287 acre tract was assessed at $3,109.54 per acre in 1984, while a 5,558 acre comparable tract—again, stipulated to be a "neighboring, comparable

propert[y]" that was "substantially the same geologically"—was assessed at $60.50 per acre in 1984. Pet. App. 20a, 22a. The large East Kentucky Energy parcel was thus assessed and taxed at a level *50 times* that of the large comparable tract.[18] To take another example, East Kentucky Energy's 1,335 acre tract was assessed at $539.04 per acre while a 1,300 acre comparable was assessed at $60.50—off by a factor of 9. Pet. App. 20a, 22a. Significantly, coal borings *were* conducted on the 1,300 acre comparable. On the basis of actual tests, the expert Mullenex concluded, comparing the 1,300 acre comparable and petitioners' property, that "the same seams * * * occur basically on both properties." [19]

In any event, it is difficult to grasp the point of the County's new argument. The Assessor testified that she assessed petitioners' property in Webster County at 50 percent of the consideration shown in the deeds. She certainly never purported to assign different values to the constituent parcels because some were more valuable than others, and the different parcels were not sold separately. Indeed, the Assessor distributed the total, single sales price over the constituent parcels in a completely arbitrary fashion. To take account of the sale from Allegheny Pittsburgh to East Kentucky Energy, for example, the Assessor raised the assessment on every parcel except parcel 3 by 10 percent, and then raised parcel 3

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[18] Quite apart from the stipulation, Mullenex testified that the 5,558 acre comparable was in fact geologically comparable, in that "it has the same coal seams present in the area" as the East Kentucky Energy property and, indeed, "it has a larger distribution of acreage of these seams, of the same seams, that were found to be mineable than the Kentucky Energy property." Resp. Opp. Cert. App. 24a-25a.

[19] Resp. Opp. Cert. App. 10a. One seam was not on the comparable, *id.* at 18a, but "there are a couple of seams that appear on the [comparable] property that is shown as mineable, but from the information that we have from drilling are not mineable on East Kentucky's property." *Id.* at 10a.

by what was left (which turned out to be a 22.4 percent increase)—all in order to make the total come out to exactly 50 percent of the selling price. *See* Pet. App. 20a. This approach clearly was not based on differing values among the parcels, because the Assessor did not undertake any comparisons or appraisals. Pet. App. 29a-30a.

D. The Discrimination Shown on the Record Cannot Be Justified

The County argues at several points that it should prevail because the court below ruled that the Assessor's actions did not constitute "intentional and systematic" discrimination. *See, e.g.*, Resp. Br. i, 4-5. As explained in petitioners' opening brief, at 23-34, this ruling by the majority below was not a factual finding but a legal conclusion, based on (1) an erroneous understanding of what the "intentional and systematic" test requires, and (2) an erroneous belief that petitioners could be relegated to raising the assessments of all others to cure any disparities. Discrimination in taxation is "intentional and systematic" when it results not from mere errors in judgment but rather from an approach "adopted as a practice"—when the challenged actions are taken "pursuant to a deliberately adopted system." *Chicago Great Western Ry.* v. *Kendall*, 266 U.S. 94, 99 (1924); *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23, 25 (1931). The County does not dispute that the assessments on petitioners' property were raised—and the assessments on other properties were not raised by a comparable amount—pursuant to a policy deliberately adopted by the Assessor. *See* Pet. Br. 30.

The County argues that courts should "not intervene merely on the ground of a mistake in judgment" on the part of the assessor, Resp. Br. 6, and we agree. Pet. Br. 26. But there is no question of exercise of judgment at issue here. The "welcome stranger" approach to assessment substituted for *any* exercise of judgment. By not

comparing the properties or conducting any physical inspections or tests, Pet. App. 29a-30a; EKE Pet. App. 59a, the Assessor abandoned her judgment and instead followed an automatic process—though one not sanctioned by any statute or regulation.

The County also contends that this Court should accord considerable deference to the statutory scheme adopted by the West Virginia Legislature, Resp. Br. 17, 25, and again we agree. Pet. Br. 23-25. Indeed, petitioners have no quarrel with that scheme. The state constitutional and statutory scheme mandates that petitioners' property and other real property in the State be treated the same—that "*all* property * * * be taxed in proportion to its value," that "*all* property subject to ad valorem taxation * * * be assessed at" a uniform percentage of its value, and that "*all* property * * * be assessed * * * at its true and actual value." W. Va. Const. art. X, §§ 1, 1b; W. Va. Code § 11-3-1 (emphasis supplied). It is *the Assessor's* appraisal policy that led to the discrimination in this case, and no amount of deference can justify the staggering disparities caused by that policy.

State law limits the interests the County can adduce in defense of its appraisal policy. Significantly, the County cannot and does not assert many of the interests advanced by its amici in this case, or interests which other courts have relied upon in other cases.[20] Thus, amici National Association of Counties, *et al.*, note that Alabama permits owners of agricultural property to elect a different valuation system, and that the California constitution permits differential valuation to link taxes to purchase price. *See* Nat'l Ass'n Br. 10-11. In West Virginia, however, all property is to be assessed and taxed

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[20] *See United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) (Court declines to consider argument raised by amicus that "was not raised by either of the parties here or below"); *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979) (same); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960) (same).

on the same basis: true and actual value. Petitioners' property *was* assessed and taxed on that basis, but other comparable properties in the County were *not*. Whether or not interests advanced by other States could sustain the disparities shown on this record, Webster County has advanced no interest remotely justifying *its* discriminatory system.

Indeed, Webster County relies most heavily on what is routinely the last refuge of arbitrary decisionmakers in equal protection cases—administrative convenience. *See, e.g.*, Resp. Br. 22, 32. Such considerations may justify marginal disparities in an otherwise valid system, but convenience alone can hardly justify unconstitutional discrimination.[21] Otherwise, a system imposing the entire tax burden on all those whose names begin with "A," or on all those who live in one county, would be constitutional as easier to administer than other systems.

The County's suggestion that equal treatment would require "exotic and expensive evaluation techniques" should not be seriously considered. Resp. Br. 32. We agree completely that "scientific uniformity" is not required, *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 526 (1959), but bland invocation of such litanies is hardly responsive to a record of disparities in assessment increases over 10 years of up to 6,500 percent, and in current assessments of up to 3,500 percent. The County's assertion that the Assessor would have difficulty doing what assessors are supposed to do comes with ill grace when the Assessor deliberately declined to undertake any appraisal activities at all, Pet. App. 29a-30a; EKE Pet. App. 58a-59a, and eschewed "use of any materials, guides, services or assistance available through the State

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[21] *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972) ("the Constitution recognizes higher values than speed and efficiency"); *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 240 (1926) ("A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid").

Tax Commissioner's Office." Pet. App. 30a; EKE Pet. App. 60a.[22] Indeed, the International Association of Assessing Officers has confirmed that the Assessor's practice in this case was "[p]lainly unacceptable." [23]

The failure of the County to satisfy the constitutional requirement was not due to any inherent difficulty—"Ample opportunity existed between 1976 and 1985 to correct inequality of assessment" established on the record, Pet. App. 39a—but rather was due to the "reluctance of the assessor and a Board of Equalization and Review to increase the real estate assessments, and consequently the real estate taxes, of friends and neighbors * * *." Pet. App. 40a; EKE Pet. App. 72a.

E. The Remedy

The County agrees that if unconstitutional discrimination is shown on this record, "then the remedy fashioned by the state court violates the Fourteenth Amendment." Resp. Br. 37. The court below relegated petitioners to attempting to raise the underassessments of comparable properties, Pet. App. 9a, but this Court has repeatedly held that such a chimerical "remedy" does not satisfy the constitutional command.[24] What *is* required is that the

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[22] For example, the task of a West Virginia County assessor has been " 'lightened to a great extent' " by preparation of the State Tax Commissioner's Guide, Pet. App. 33a, EKE Pet. App. 65a (quoting *Tug Valley Recovery Center, Inc.* v. *Mingo Cty. Comm.*, 261 S.E.2d 165, 173 (W. Va. 1979)), but the Webster County Assessor, upon receipt of that Guide, "placed [it] in a drawer where it remained unused and abandoned until the day of the hearing" in the Circuit Court. Pet. App. 34a; EKE Pet. App. 66a.

[23] Brief Amicus Curiae of the International Association of Assessing Officers in Support of Petitioners, at 13. *See also* Brief of Amicus Curiae National Association of Realtors in Support of Petitioners.

[24] *See Sioux City Bridge* v. *Dakota County*, 260 U.S. 441, 446 (1923); *Cumberland Coal*, 284 U.S. at 28; *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623-624 (1946).

taxpayer discriminated against "have his assessment reduced" to the level of comparable properties, "even though this is a departure from the requirement of statute." *Sioux City Bridge*, 260 U.S. at 446.

The County suggests several alternative "remedies" that may or may not cure the discrimination at some point in the future, such as turning taxing responsibilities in the County over to the State Tax Commissioner, ordering a reassessment of all property, or ordering implementation of a statewide reappraisal called for in a 1982 state constitutional amendment (which, six years later, has yet to be implemented). Resp. Br. 38. None of these possible and future remedies will cure the already-accomplished discrimination against petitioners. What petitioners are entitled to *now* is relief from the unconstitutional assessments imposed on them in the past, and "a *mandate* of equal treatment" for the future. *Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984) (emphasis in original).

CONCLUSION

For the foregoing reasons, and those in petitioners' opening brief, the judgment below should be reversed.

Respectfully submitted,

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Nos. 87-1303 and 87-1310

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE (AND REPRESENTATION AS TO CONSENT FOR FILING)

Counsel for the International Association of Assessing Officers (IAAO) have received written consent from the counsel for Petitioners in this case to the filing of an amicus brief by IAAO. The written consent from counsel for Petitioners is being forwarded to the Clerk of the Supreme Court with this Brief. Counsel for Respondent in this case has consented to the filing of an amicus brief by IAAO in a telephone conversation with counsel for IAAO. Counsel for Respondent also advised counsel for IAAO that Respondent's written consent to the filing of IAAO's amicus brief would be forwarded to counsel for IAAO for filing with the Clerk of the Supreme Court, but counsel for IAAO have not yet received that written consent.

The International Association of Assessing Officers is a nonprofit educational membership organization dedicated to improving the administration of the property tax and to improving the understanding of important property tax issues. Founded in 1934, the organization has approximately 7,800 members worldwide, who come from governmental, business, and academic communities, including assessment agencies in state and local governments in all fifty states.

The eight objectives of IAAO are stated in the IAAO Constitution, Art. 1, Sec. 2, as follows: (1) to improve the standards of assessment practice; (2) to educate those engaged in assessment practice; (3) to elevate the standards of personnel requirements in assessment offices; (4) to educate the general public in matters relating to assess-

ment practice; (5) to engage in research and to publish the results of studies in assessment administration; (6) to provide a clearinghouse for the collection and distribution of useful information relating to assessment practice; (7) to cooperate with other public and private agencies interested in improving assessment administration; and (8) to promote justice and equity in the distribution of the property tax burden. IAAO speaks here as an organization dedicated to equitable, efficient, and credible property taxation and not as a "trade union" for assessors.

IAAO is concerned about the assessment inequities that would result and the burdens that would be placed upon taxpayers seeking relief from overassessment if the Supreme Court of the United States were to affirm the decision of the court below. In its decision, the Supreme Court of Appeals of West Virginia endorsed "welcome stranger" assessing, a practice inimical to the fundamental notion of equity in an ad valorem property tax. Furthermore, the remedy to which that court's decision relegates relatively overassessed taxpayers (appealing the assessments of relatively underassessed taxpayers) is unworkable, since it requires relatively overassessed taxpayers to bear the responsibility for auditing the assessment roll and monitoring sales and changes in assessments, when both of these functions can only be performed by the assessor, the county board of equalization, and the state tax commissioner.

IAAO believes that affirming the decision of the court below would jeopardize seventy years of legislative, administrative and judicial progress in improving the equity of the property tax. Therefore, IAAO urges this Court to reverse that decision, holding the "welcome stranger" system of assessment unconstitutional and directing that the Petitioners' property be reassessed at the prevailing level of assessment in the county.

SUMMARY OF ARGUMENT

We submit that the Supreme Court of Appeals of West Virginia erred in concluding that the Webster County Assessor's administrative policy, not sanctioned by legislation, of reassessing properties recently sold, based on a percentage of their selling prices, while not reassessing similar properties that had not been sold, did not amount to discriminatory assessment prohibited by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. There is no rational basis for the policy. Although the price paid for property in an arm's-length transaction is relevant evidence of its true and actual value, this Court's decision in *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350 (1918), established that "intentional and systematic" undervaluation of other property in the same class contravenes the constitutional rights of one taxed upon the full value of his property. Furthermore, this Court's decisions in a line of cases, beginning with *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), demonstrate that the Webster County Assessor's "welcome stranger" assessment policy constitutes the kind of "intentional and systematic" assessment discrimination that violates federal equal protection requirements (and state constitutional requirements having a similar scope). Accordingly, this Court should hold that, in ad valorem property tax administration, the practice of systematically assessing recently sold properties at a percentage of their selling price, while not reassessing similar properties that have not been recently sold, is a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

We also submit that the court below erred in determining that the Petitioners in this case had no remedy for the relative overassessment of their property other than to seek an upward revision of assessments for relatively underassessed similar property. Such "remedies" are too expensive and time-consuming to be of any value to taxpayers. Therefore, this Court established, in the *Sioux City Bridge Co.* line of cases, that relatively overassessed taxpayers suffering from unconstitutional discrimination are entitled to have their assessments reduced to the percentage of true value at which others are taxed, even if their own property is assessed at true value in accordance with statutory law. We contend that the prevailing level of assessment in the same county is the proper level to which the Petitioners' assessments in the case at bar, and the assessments of similarly situated taxpayers, should be reduced. Consequently, this Court should hold that taxpayers subject to discriminatory assessments for ad valorem property tax purposes, including the Petitioners in the case at bar, should not be required to seek an increase in the assessments of relatively underassessed properties, but have a right to a reduction of their assessments to the prevailing level of assessment for similar property in the county.

ARGUMENT

1.

THIS COURT SHOULD HOLD THAT, IN AD VALOREM PROPERTY TAX ADMINISTRATION, THE PRACTICE OF SYSTEMATICALLY ASSESSING RECENTLY SOLD PROPERTIES AT A PERCENTAGE OF THEIR SELLING PRICES, WHILE NOT REASSESSING SIMILAR PROPERTIES THAT HAVE NOT BEEN RECENTLY SOLD, IS A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In this proceeding, involving the Petitioners' consolidated challenges to the valuations placed on their properties for ad valorem tax purposes by the Webster County Assessor, the Supreme Court of Appeals of West Virginia reversed a circuit court determination that the assessments in question violated Petitioners' state and federal constitutional rights, holding that the Assessor's practice of using recent deed values as the basis of appraising property subject to ad valorem taxation did not violate the equal and uniform taxation clause of Article X, Section 1 of the West Virginia Constitution (and, by extension, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution). *In re 1975 Tax Assessments Against Oneida Coal Co., et al.*, 360 S.E.2d 560 (W.Va. 1987) (hereafter referred to as *Oneida Coal*). In reaching that decision, the state supreme court found that the Petitioners' properties were properly assessed based on their true and actual value,[1] and that the Peti-

[1] Until 1982, W.Va. Code §18-9A-11 allowed assessment of property at between 50 and 100 percent of its appraised value. But this statutory provision was struck down by the Supreme Court

(Footnote continued on following page)

tioners had failed to prove that undervaluation of other similar properties in Webster County was "intentional and systematic," a burden of proof that all taxpayers seeking relief from discriminatory assessments must meet, as established by a line of decisions of this Court, starting with *Sunday Lake Iron Company v. Township of Wakefield*, 247 U.S. 350 (1918).[2]

We believe the lower court made a compound error in its loosely worded decision. The West Virginia court seems not to have appreciated the *tax* consequences of the county's systematic practice of reassessing properties that happened to have been sold while not reassessing similar or surrounding properties ("welcome stranger" assessing, also referred to as "sales chasing" and "shot-

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[1] *continued*
of Appeals of West Virginia in *Killen v. Logan County Commission*, 295 S.E.2d 689 (W.Va. 1982). In 1981, W.Va. Code §18-9A-11 was amended to provide for assessed valuations at not less than 60 percent of appraised value, and W.Va. Const. Art. X, §1b was adopted the following year, requiring uniform state-wide assessments at 60 percent of market value. W.Va. Code §11-3-1 now establishes that all property shall be assessed annually at its "true and actual value," and W.Va. Code §11-3-24 requires a review and equalization of assessments annually by the county commission (though the County Commission of Webster County, in the present case, upheld the patently "unequal" assessments placed on the Petitioners' property).

[2] *See also Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *Southern Railway Co. v. Watts*, 260 U.S. 519 (1923); *Chicago G.W. Ry. v. Kendall*, 266 U.S. 94 (1924); *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23 (1931). *Chicago G.W. Ry. v. Kendall*, 266 U.S. 94, 100, contains a further reference to an "arbitrary and unconscionable" test, but that approach to determining whether assessment disparities amount to unconstitutional discrimination was not adopted by the court below—and properly so—although the "arbitrary and unconscionable" label certainly fits the inequities that resulted from the "welcome stranger" assessing in the present case.

gunning"), in the light of the West Virginia constitutional standard of uniform taxation and federal equal protection requirements. In addition, the state supreme court ignored contemporary standards in the field of property tax administration as well as the holdings of this Court.

Article X, Section 1 of the West Virginia Constitution provides that "[s]ubject to the exceptions in this section contained, *taxation* shall be equal and uniform throughout the State, and all property, both real and personal, shall be *taxed* in proportion to its value. . . ." (Emphasis added) In West Virginia, classes of property within tax districts are taxed at uniform *nominal* rates.[3] However, if assessments are not at a uniform proportion of *value*, *effective* tax rates will be unequal.[4] The *uniform use* of a flawed method of assessment will not result in uniform taxation, a principle that this Court recognized in *Cumberland Coal* [illegible]*v. Board of Revision*, 284 U.S. 23, 29-30

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[3] The nominal tax rate is the stated tax rate. It does not necessarily correspond to the effective tax rate, which is the tax rate expressed as a percentage of market value. The effective tax rate will be different from the nominal tax rate where the assessment ratio is not equal to 1. The assessment ratio is the fractional relationship an assessed value bears to the market value of the property in question.

[4] In the case of *In re Assessment of U.S. Steel*, 165 W.Va. 373, 268 S.E.2d 128 (1980), the Supreme Court of Appeals held that the steel company was the victim of improper discrimination in assessment because the assessor deliberately listed its property at a higher percentage of true and actual value than the percentage at which comparable properties were listed. But the assessor's deliberate use of different *nominal assessment rates* in that case had no greater effect on assessment equity, in terms of causing the effective tax rates for comparable property to differ, than the "welcome stranger" policy of Webster County in the present case.

(1931).[5] But the West Virginia court lost sight of that fact when it held, in its endorsement of "welcome stranger" assessing: "The uniform use of recent deed values as the basis for appraising property subject to ad valorem taxation does not violate W.Va. Const., art. X, §1." *Oneida Coal*, 360 S.E.2d 560, 564.

This Court has not addressed "welcome stranger" assessing, but several state courts have. While the Supreme Court of New Hampshire struck the practice down in *Duval v. City of Manchester*, 111 N.H. 375, 286 A.2d 612 (1971), the Supreme Court of Rhode Island skirted the issue of the practice's constitutionality in *Merlino v. Tax Assessors for Town of North Providence*, 114 R.I. 630, 337 A.2d 796, 802 (1975), by holding that plaintiffs had failed to provide sufficient evidence of disproportionate taxation, and the Supreme Court of California upheld the practice when it ruled Proposition 13 constitutional in *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 232, 149 Cal. Rptr. 239, 583 P.2d 1281 (1978).

Proposition 13, which added Article XIII A to the California Constitution, required real property to be assessed on the basis of its acquisition value (in effect, legalizing "welcome stranger" assessing). The *Amador Valley* case can be distinguished from the present case, however, because the California court was ruling on a legislative initiative, for which the court (wrongly, we think) hypothesized a "rational basis" (namely, that certainty about one's

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[5] The *uniform* use of a flawed method of assessment has been recognized by other courts as resulting in nonuniform taxation. *See, e.g., Fisher-New Center Co. v. Michigan State Tax Commission*, 380 Mich. 340, 157 N.W.2d 271 (1968); *Sparks v. McCluskey*, 84 Ariz. 283, 327 P.2d 295 (1958).

future property tax burdens overrode traditional notions of equity, ability to pay or benefits received). In contrast, the West Virginia supreme court upheld an administrative practice not sanctioned by legislation.

Although the *Amador Valley* case can be distinguished from the present one, the effects of Proposition 13 in California illustrate the inequities that follow from "welcome stranger" assessing. In that regard, it might be noted that the estimated 1988 effective tax rate for residential properties in California that have not been sold since Proposition 13 was enacted in 1978 is less than 0.3 percent, whereas the effective tax rate for recently sold properties is 1.0 percent.[6]

Since "welcome stranger" assessing is rarely acknowledged by assessing officials, other conclusive empirical evidence of the assessment inequities that result from the practice is extremely difficult to come by. However, the following hypothetical example, based on reasonable assumptions about contemporary trends in real estate values, demonstrates the degree of inequities that can reasonably be assumed. In the example, virtually identical properties are assumed to have had a market value of $15,000 in 1963 and a market value of $87,000 in 1988. The assessor assesses each property on the basis of 50 percent of its most recent sale price. Property is taxed at a (nominal) rate of 4 percent of assessed value. The year in which each property was sold, its sale price, and data on as-

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[6] Break, *Proposition 13's Tenth Birthday: Occasion for Celebration or Lament?* (Unpublished paper presented at Lincoln Institute of Land Policy's Tax Policy Roundtable, April 28-30, 1988, Coronado, California), pp. 14-21.

sumed 1988 assessed values, property taxes, assessment ratios, and effective tax rates are presented below.[7]

Property	Year of Sale	Sale Price	Assessed Valued	Tax Bill	Assessment Ratio	Effective Tax Rate
1	1963	$15,000	$ 7,500	$ 300	9%	0.3%
2	1973	39,000	19,500	780	22	0.9
3	1983	68,000	34,000	1,360	39	1.6
4	1988	87,000	43,500	1,740	50	2.0

The data on effective tax rates in the illustration above demonstrate that the property assumed to have been sold in 1988 has an effective tax rate that is approximately six times the rate of the property assumed to have been last sold in 1963. The present case would seem to involve even greater inequities, however, as the trial court in this case found that the difference between the assessments in dispute and the assessments of similar properties that had not recently been sold was much greater than the difference assumed in our illustration above.

The effects of "welcome stranger" assessing may be viewed from another perspective: that of generally accepted standards of assessment uniformity. The most widely accepted index of assessment uniformity is the "coefficient of dispersion."[8] Coefficients of dispersion of 15 percent or less generally are regarded as indicative of satisfactory assessment performance for residential property, and coefficients of 20 percent or less are generally regarded as demonstrating satisfactory performance in assessing properties generally within a jurisdiction.

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[7] The assessment ratio of a property, in this instance, is the assessed value of the property divided by its estimated market value on the assessment date, which is assumed to be $87,000.

[8] The coefficient of dispersion is the average absolute deviation of a group of assessment ratios, taken around the median ratio and expressed as a percentage of that measure.

Data on coefficients of dispersion compiled by the U.S. Bureau of the Census during the quinquennial Census of Governments provide an indication of the effects on assessment performance of "welcome stranger" assessing in California under Proposition 13.[9] In 1976, the median coefficient of dispersion of the counties surveyed was 17.1, whereas by 1981, the comparable measure had risen to 28.2. In 1976, California ranked sixth among states nationwide in terms of this measure of assessment uniformity, but in 1981, California ranked thirty-third (West Virginia ranked forty-seventh and thirty-fourth in those years, respectively).

An increase in the coefficient of dispersion implies an increase in the average inequality of property tax burdens.[10] Again using data on California from the 1977 Census of Governments and the 1982 Census as an example, the *average* property tax mispayment in California increased 26 percent, from about $140 to about $190, even though the average effective tax rate decreased 59 percent, from

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[9] U.S. Bureau of the Census, *1977 Census of Governments*, vol. 2, *Taxable Property Values and Assessment-Sales Price Ratios* (Washington, D.C., 1978) and U.S. Bureau of the Census, *1982 Census of Governments*, vol. 2, *Taxable Property Values and Assessment/Sales Price Ratios* (Washington, D.C., 1984).

[10] Geraci and Plourde, "Benefits and Costs of Improved Property Tax Assessment," in International Association of Assessing Officers, *Analyzing Assessment Equity: Techniques for Measuring and Improving the Quality of Property Tax Administration* (Chicago, 1977).

1.7 percent to about 0.7 percent of market value.[11] As the earlier hypothetical example suggested, individual inequities can be much greater and will increase as time passes. Inequities with greater relative magnitudes can be expected in Webster County, West Virginia if this Court upholds the "welcome stranger" policies of the County Assessor.

It is for reasons such as those we have illustrated here that the International Association of Assessing Officers recommends in its policy statements that assessments should be based on current market values. The property tax is generally conceived to be an ad valorem tax, which means that a tax levy is apportioned among taxpayers according to the value of each taxpayer's property. In a dynamic economy, not only are revenue needs changing, but the values of property are also changing. While some values increase, others remain stagnant, and still others decline. It follows that as long as property values are changing, a uniform relationship between property values and property taxes can be attained only if current market

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[11] The assumptions and calculations upon which this illustration is based are:

Year	Average Property Value	Coefficient of Dispersion	Average Assessment Error (Col. 2 × Col. 3)	Effective Tax Rate	Average Mispayment (Col. 4 × Col. 5)
(1)	(2)	(3)	(4)	(5)	(6)
1976	$47,000	0.171	$8,100	0.017	$140
1981	100,600	0.282	28,400	0.007	280

Sources:

U.S. Bureau of the Census, *1977 and 1982 Censuses of Government*, vol. 2: column 2, tables 9 and 11, respectively; column 3, tables 16 and 18, respectively; and column 5, tables 20 and 22, respectively.

value is the basis for assessment, and current market value assessment clearly implies an annual assessment program.

An annual assessment program requires assessors to: consciously and continuously reevaluate the factors that affect value, express the interactions of those factors mathematically, use those mathematical expressions, which are referred to as mass appraisal models, and other mass appraisal techniques to estimate the values of properties, and repeat this process annually to maintain equitable assessments at statutory levels. Annual assessment does not require assessors to change all assessments each year, but it does require assessors to maintain the capability of changing each assessment each year if a change is warranted, and to maintain an effective program for periodically reinspecting properties.

For a variety of reasons, legal assessment standards may not conform to our recommendations, and contemporary standards view as marginally acceptable assessment programs that ensure intervals of no greater than four years between reappraisals of each and every taxable property in an assessment jurisdiction. Plainly unacceptable reappraisal practices, on the other hand, include unmaintained reappraisal systems, and reappraisals triggered only by an external activity affecting comparatively few properties, such as "welcome stranger" assessing.[12] The last general reappraisal in Webster County was completed in 1964.

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[12] International Association of Assessing Officers, *Improving Real Property Assessment: A Reference Manual* (Chicago, 1978), pp. 331-32.

In the present case, despite our belief that assessments should be based on current market values, we contend that the West Virginia supreme court erred in its application of a previous holding by the same court that "The price paid for property in an arm's-length transaction, while not conclusive, is relevant evidence of its true and actual value. . . ." *Kline v. McCloud*, 326 S.E.2d 715, 716 (W.Va. 1984). As a reflection of generally accepted *appraisal* practice, the court's holding in *Kline v. McCloud* is correct. However, proper appraisal of newly sold properties at a percentage of their true and actual value based, at least in part, on sales price must be accompanied by regular reassessment of other properties to prevent inequities.

The West Virginia supreme court also erred when it ruled that the county's assessment practices did not constitute "intentional and systematic" discrimination, as that ruling was contrary to several of this Court's previous decisions. In *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 447 (1923), this Court made it clear that the burden of proving variances in assessments are "intentional and systematic" requires only that a taxpayer show that a relative overassessment of his property does not result from "mere errors of judgment." Similarly, in *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 25 (1931), this Court condemned discriminatory action, like that in the present case, not involving "mere errors in judgment," but an assessment system that was "deliberately adopted," ignored "differences in actual values," and was "nonetheless systematic and intentional because of belief [by the county officials] in its validity."

In the decision below, the West Virginia supreme court stated that it was the "policy" of the Webster County Assessor's office to assess all recently transferred prop-

erty on the basis of 50 percent of deed values, and the court found that "this *method* was uniformly followed for all such property." *Oneida Coal*, 360 S.E.2d 560, 563. (Emphasis added) It is therefore incomprehensible, in light of this Court's previous rulings on the subject, that the lower court could find this "policy"—"methodically" applied by the Assessor—was not "intentional and systematic."

The present case is certainly not comparable to cases in which this Court has previously permitted assessment disparities to continue. It does not involve differences in assessment procedure for properties in different legislatively-created classes, like many of the cases cited by the Respondent in briefs filed with this Court.[13] Nor is it a futile quest by Petitioners for "precise, scientific uniformity" in assessment, like the taxpayers' case in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959), but rather an attempt to remedy *gross* disparities in assessments within a single property class.

As support for its decision, the Supreme Court of Appeals of West Virginia cited its own statement in *Kline v. McCloud*, 326 S.E.2d 715, 720 (W.Va. 1984), that the court was dealing with a case "somewhat analogous to those situations where an assessor makes a partial reappraisal of property which results in such property receiving a higher value than other property, or there is disparate valuation between tax districts." But these situations are quite distinguishable from the present case, because the Webster County Assessor has not made an

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[13] *See Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933); *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362 (1940); *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182 (1945); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973)

"honest effort" to achieve equitable assessments over a reasonable period of time through partial, cyclical reassessment of all property in the jurisdiction. Instead, within one tax district, extreme assessment inequities have been allowed to persist for many years, and Webster County is following a "policy" of making them worse.[14]

Since the record is clear that the Webster County Assessor's practice of reassessing recently sold property on the basis of its sale price, while not reassessing similar unsold properties, was "intentional and systematic," and since the consequences of the practice in a changing market are obvious, and unexcused by any principles enunciated by this Court or any other, amicus IAAO respectfully submits that the Webster County Assessor's policy of "welcome stranger" assessing should be condemned by this Court as a violation of federal equal protection requirements.

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[14] Amicus does not regard the Webster County Assessor's periodic, arbitrary and de minimus increases in assessments for property not recently sold as being an acceptable attempt at removing assessment inequities in the county. Across-the-board percentage increases in assessments do not reduce inequities; they merely increase the tax base. Such increases are not the equivalent of an "honest effort" to eliminate discrimination. *See Sunday Lake Iron Company v. Township of Wakefield*, 247 U.S. 350, 353 (1918).

2.

THIS COURT SHOULD HOLD THAT TAXPAYERS SUBJECT TO DISCRIMINATORY ASSESSMENTS FOR AD VALOREM PROPERTY TAX PURPOSES SHOULD NOT BE REQUIRED TO SEEK AN INCREASE IN THE ASSESSMENTS OF RELATIVELY UNDERASSESSED PROPERTIES, BUT HAVE THE RIGHT TO A REDUCTION OF THEIR ASSESSMENTS TO THE PREVAILING LEVEL OF ASSESSMENT IN THE COUNTY.

While finding that no violation of equal protection requirements was involved in the present case, the Supreme Court of Appeals of West Virginia also held that, since the Petitioners' properties were assessed at true and actual value, Petitioners should have appealed to the county commission, sitting as the county board of equalization and review, to have other comparable properties' assessments raised to market as a remedy for the disparities in assessment that were clearly present in this case. *Oneida Coal*, 360 S.E.2d 560, 564-65. Amicus IAAO believes, however, that the lower court's decision to relegate the Petitioners to such a "remedy" fails to take into consideration the burdens it places upon taxpayers seeking to correct assessment inequities, and could only be reached through a process of deliberately ignoring this Court's previous rulings on appropriate remedies in assessment discrimination cases.

It has been a long-standing principle of this Court that a taxpayer, "though assessed at no more than full value for his property, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others." *Southern Railway Co. v. Watts*, 260 U.S. 519, 526 (1923). Moreover, it is settled law in discrimination cases that because it is virtually impossible for a relatively overassessed taxpayer to have the value of all property within a jurisdiction raised to full value, the value

of the taxpayer's property may be reduced to achieve fairness. As the Court stated in *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446 (1923):

> [t]he right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of true value, and uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.

Admittedly, a relatively overassessed taxpayer cannot complain of discrimination if a state, acting on its own, raises other taxpayers' assessed values to the level of the overassessed taxpayer's property in an attempt to correct inequities, instead of lowering the overassessed taxpayer's assessment. But it is a violation of the U.S. Constitution if the state does not correct discriminatory valuation, instead requiring the taxpayer to do it himself. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931).

The West Virginia supreme court, in the present case, has chosen to require the Petitioners to raise the assessed value of other taxpayers' property located in the same jurisdiction. "In the future," the court has said, "taxpayers who claim that they are being overassessed in relation to other taxpayers may not seek to have their assessments reduced as long as their property is valued at market value. Instead, they should seek to have the assessments of other taxpayers raised to market value." *Killen v. Logan County Commission*, 295 S.E.2d 689, 709 (W.Va. 1982). As justification for this position, the West Virginia court has noted that "any interested party" may seek the

suggested relief by filing for a writ of mandamus under W.Va. Code §11-3-25. *Tug Valley Recovery Center, Inc. v. Mingo County Commission*, 164 W.Va. 94, 261 S.E.2d 165 (1979).

The West Virginia court's position fails to consider, however, that the time and the cost to the taxpayer of making such an assessment appeal would prohibit any taxpayer from obtaining relief. If a taxpayer cannot get relief under the laws, his constitutional right to equal protection under the law has been violated. So, from the viewpoint of amicus IAAO, the West Virginia remedy, in essence, perpetuates unequal and nonuniform assessments.

The lower court's remedy would require the Petitioners, and even residential property owners who may suffer from comparable assessment inequities, to audit the *entire* assessment roll (there are approximately 8,800 parcels of real property in Webster County), and monitor *all* sales of real property and *all* changes in assessment, in order to prove their case before the county board of equalization and review. These would be functions of the assessor, the county board of review and the state tax commissioner in a standard assessment system, for they require the use of sophisticated assessment-ratio studies to evaluate the level and uniformity of assessments. Furthermore, even if the Petitioners were able to present sufficient evidence on the underassessment of other property, recent history in West Virginia concerning reassessments does not augur well for the Petitioners actually obtaining any relief from the county board of equalization and review.[15]

[15] Legislative and administrative responses to judicial attempts at compelling equitable assessment and taxation of property, in *Pauley v. Bailey*, Civil Action No. 75-1268 (Circuit Court of Kanawha County, West Virginia, May 1982) and *Killen v. Logan County Commission*, 295 S.E.2d 689 (W.Va. 1982), have been hostile, including a delay of the 1985 reappraisal.

For the foregoing reasons, we believe that this Court should hold that the assessments on the Petitioners' properties should be reduced to the prevailing level of assessment in the county for the years in question. There are two policy reasons for this recommendation: (1) reducing overassessed property to the prevailing level of assessment provides an incentive for the county to revalue underassessed property in order to maintain the tax base, and (2) burdens of proof are appropriately placed. The only burden a property owner should have to overcome is the presumption that her or his property is correctly assessed; a property owner should not be required to perform the role of an assessment review and equalization agency.

Although there are ample grounds for our recommendation that the prevailing level of assessment in the county is the level to which Petitioners' assessments should be reduced,[16] we recognize that there may be practical difficulties to overcome in applying that rule, since assessment-ratio studies to determine assessment levels have not been regularly conducted in West Virginia. U.S. Census of Governments data can be used, however, to approximate the prevailing level of assessment in the absence of better data, and this Court can compel Webster County, West Virginia to develop better data for use in the future. According to Census of Governments data, in 1976, the median assessment ratio for property with single-family (nonfarm) houses for the median area in West Virginia was 28.5 percent; in 1981, the comparable statistic was 21.0 percent.[17]

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[16] *See* Baar, *Property Tax Assessment Discrimination Against Low-Income Neighborhoods*, 1 Property Tax Journal 1, 22-24 (1982).

[17] U.S. Bureau of the Census, *1977 and 1982 Censuses of Governments*, vol. 2, tables 15 and 17, respectively.

CONCLUSION

We respectfully conclude that this Court should hold that assessing recently sold property at a percentage of its sale price while not reassessing similarly situated but unsold property, and requiring taxpayers subject to this practice to raise the assessments of other comparable property within a jurisdiction, is discriminatory and a direct violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This Court should also reduce the Petitioners' assessments to the prevailing level of assessment in the county, because, as the dissent stated in *Oneida Coal*, 360 S.E.2d 560, 565, "the quest for true value [should not] override the *constitutional* requirement that taxation be equal and uniform."

Respectfully submitted,

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Nos. 87-1303 and 87-1310

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLEGHENY PITTSBURGH COAL COMPANY,

Petitioner,

v.

COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA,

Respondent.

EAST KENTUCKY ENERGY CORPORATION, ONEIDA COAL COMPANY, INC., and SHAMROCK COAL COMPANY, INC.,

Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Appeals Of West Virginia

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS

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Nos. 87-1303 and 87-1310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

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Petitioner,

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS*

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* All parties of record in this case have consented pursuant to Supreme Court Rule 36.2 to the filing of this *amicus curiae* brief in support of the Petitioners. These consents are filed herewith.

IDENTITY OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter "NAR") is a not-for-profit professional association comprised of over 750,000 persons engaged in all phases of the real estate business.

NAR was created in 1908 to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR includes among its members real estate brokers, managers, appraisers, counselors and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in and committed to the solution of every significant problem encountered by property owners for three quarters of this century. Through its long and undeviating commitment to the protection of the property owner and his rights and interests in his property, NAR has earned the right to speak not only for the real estate industry but for the American property owner.

Of the problems which have concerned NAR, few if any have been of greater importance than the preservation of the right of the individual to own real property and to exercise and enjoy the benefits of ownership as guaranteed by the Constitution of the United States of America. This commitment to the rights of the individual property owner is the foundation upon which NAR continues to grow, for without such rights there would be no development, transfer, or enjoyment of real estate.

INTEREST OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® believes that the political stability and economic prosperity of the United States of America is dependent in large measure upon the right of the individual to own real property and to exercise and enjoy the benefits of ownership. In furtherance of this belief, NAR opposes actions by governments, groups, or individuals which diminish or deny the full and free exercise of this right. The assessment and taxation practices of the State of West Virginia inhibit the free transfer of real estate and as such, constitute the type of action to which NAR is opposed.

The historical and substantial commitment of NAR to the preservation of private property rights mandates its attention to the threat presented by the West Virginia tax assessment practices to property owners and property ownership across the country.

As the nation's largest trade association within the real estate industry, NAR believes it is uniquely positioned to perceive the seriousness of this threat. Not only does NAR's membership span the entire nation, but these members are involved in upwards of 80% of real property resale transactions. This comprehensive involvement at the grassroots level of land development, investment and sale provides NAR with a direct and unobstructed view of the negative impact practices such as the one at issue here will have on the exercise of constitutionally protected property rights.

NAR does not propose herein to duplicate the legal arguments presented in Petitioners' Brief. Rather, NAR endorses and urges to this Court these arguments. Fur-

ther, to avoid unnecessary repetition, NAR adopts the statement of the case set forth in Petitioners' Brief. The purpose of NAR in submitting this brief *amicus curiae* is to voice the concern of hundreds of thousands of NAR members and the millions of American property owners they serve with the threat which the decision of the court below constitutes to the rights of the private property owner guaranteed by the Constitution.

INTRODUCTION

This case involves the fundamental constitutional right of private property ownership. NAR seeks reversal of the decision below and invalidation of the Webster County, West Virginia tax assessment system.

It is the practice of the State of West Virginia, through its duly appointed agents, to apply an *ad valorem* tax on real property by assessing the property on the basis of the value of consideration as recited in the deed of sale. This practice results in a higher tax on those properties which have been conveyed more recently than comparable properties that have not. This disparity in the tax assessments of comparable properties is due to the appreciation of property values. In assessing property in this manner, the State of West Virginia is intentionally and systematically discriminating against those taxpayers who have recently purchased property. This discrimination inhibits the free transfer of real property and thus impinges upon the constitutional right of every individual to own real property and to exercise and enjoy the benefits of ownership.

In addition to restraining the free transfer of real property, a system such as that permitted by the State of West Virginia may also result in an unnatural maneuvering of the sales price in a real property transaction as owners and purchasers try, themselves, to create some equality and adjust for the disparate taxation. As two scholarly commentators have noted:

> . . . assessment differentials may affect the market or sale price of properties as purchasers react to either the favorable or unfavorable assessments. Thus, systematic variations in assessment practices within a community may have the effect of penalizing or rewarding specific individuals, or even entire neighborhoods.

Inman and Rubinfeld, *The Judicial Pursuit of Local Fiscal Equality*, 92 Harv.L.Rev. 1662, 1702 (1979).

Currently, there are approximately 90 million households in the United States, of which two thirds own their own home. Additionally, housing transactions have combined to constitute an estimated $222 billion worth of economic activity in 1987, resulting in approximately 5% of the nation's gross national product. Clearly, these statistics show that homeownership is an integral part of our democratic society. Every American should have the opportunity to live in decent and affordable housing. This goal can only be achieved through government practices which encourage rather than inhibit the free transfer of real property.

According to a late 1986 study commissioned by NAR and conducted by Market Facts, Inc., entitled "*Homeownership: Key to the American Dream*", in the late 1970's, the rate of homeownership was on a rise. This increase peaked in 1980 at a rate of 65.6%. Since this time, the homeownership rate for the country has been

steadily declining, as evidenced by the low rate in 1986 of 63.8%. The study showed that the decline was most dramatic among individuals in the 25-34 age bracket which traditionally constitutes the largest home buying group and consists mainly of first time buyers. In this age group, the rate of homeownership dropped from 55% in 1980 to 45.7% in 1986. Notwithstanding this declining rate, the study found that homeownership still ranked at the top of Americans' list of priorities as an important ingredient to a full and satisfying life.

This drastic decline in the rate of homebuyers has been attributed, by the above study, to the sharp increase in housing prices and interest rates in the past years. This increase, coupled with a disproportionate rise in income, has resulted in large numbers of low to moderate income households and young couples finding it more difficult to accumulate the resources necessary to buy a home. Taxation practices such as that advocated by the court below which serve to discriminate against those engaged in current real property transfers, can only serve to make this problem worse.

NAR supports and advocates an equitable system of real property taxation which is based upon the fair market value of property. Equity, however, cannot be achieved where some property is taxed based upon fair market value but comparable property owned by others remains assessed at a far lower level. Fundamental principles of equality established in the Fourteenth Amendment of the United States Constitution require the reversal of the decision of the lower court and a reaffirmation of the right of an individual to own real property free from the discriminatory taxation practices condoned by the court below.

ARGUMENT

I.

THE COURT BELOW ERRED IN HOLDING THAT THE DISCRIMINATORY TAX ASSESSMENT PRACTICES DO NOT VIOLATE THE GUARANTEE OF EQUAL PROTECTION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The Assessment And Taxation Practices Of The State Of West Virginia Are Discriminatory And In Violation Of The Equal Protection Clause.

The equal protection clause of the Fourteenth Amendment states that; "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1, cl. 4. This Court has long held that the purpose of the equal protection clause is to protect persons from intentional and arbitrary discrimination. *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441 (1923); *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350 (1918); *Raymond v. Chicago Union Traction Company*, 207 U.S. 20 (1907). Discrimination is the failure to treat equally all persons under like circumstances. This Court has spent a considerable amount of its time and effort creating well established rules regarding discrimination in taxation practices. As this Court stated in *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946); "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class."

Discrimination may occur when a taxpayer's real property is over assessed in relation to comparable property

so that he pays greater than his fair share of taxes. However, a taxpayer who is not assessed at and does not pay an excessive amount may still be the victim of discrimination through the underassessmentof his fellow taxpayers' property. *Southern Railway Co. v. Watts*, 260 U.S. 519 (1923); *Raymond v. Chicago Union Traction Company, supra.*

Although this is the exact issue the Court faces today, it is one that the Court settled long ago in the case of *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441 (1923). In *Sioux City*, the taxpayer sought to lower the valuation of its property, claiming that the State of Nebraska unconstitutionally assessed its property at 100% of its true value while all the other real estate in the county was assessed at 55%. In reviewing the situation, the Supreme Court of Nebraska did not decide whether the taxpayer had been discriminated against but rather assumed the presence of discrimination and went on to discuss the taxpayer's remedies. On appeal to this Court, Chief Justice Taft stated the Court's well established rule that "intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional rights of one taxed upon the full value of his property." *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. at 445, citing *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352 and *Raymond v. Chicago Union Traction Company, supra.*

This rule of law was reiterated by the Court on the same day in *Southern Railway* when Justice Brandeis wrote:

> The rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others (citations omitted). *Southern Railway Co. v. Watts*, 260 U.S. at 526.

This principle established by the Court in *Sioux City* and *Southern Railway* has never been limited or overturned.

A necessary corollary to this rule is that taxing a property owner no more than his fair share does not cure the constitutional infirmity. The State of West Virginia applies its *ad valorem* tax to real property based on the value of consideration recited in the deed of sale. This practice necessarily results in recently conveyed properties being assessed on the basis of their current market value while other comparable properties which have not recently been conveyed are assessed at lower values.

The court below held that the State's taxation practices did not discriminate against Petitioners because the assessment of Petitioners' property was based on the true and actual value of that property. The Petitioners do not disagree that they have been taxed based upon the actual value of their property. Impermissible discrimination arises, however, when comparable property owned by others is not likewise assessed on the basis of its actual value but at a far lower level. This practice results in the undervaluation of property in the same class which has clearly been held by this Court in *Sioux City* and *Southern Railway* to be unconstitutional. Such practices must, therefore, be declared violative of the equal protection clause of the Fourteenth Amendment.

B. The Discriminatory Taxation Practice Is Systematic And Intentional.

This Court has held that unequal assessments will not be deemed to be in violation of the equal protection clause unless it can be shown that the undervaluation was intentional and systematic. *Southern Railway Co. v. Watts*, 260 U.S. at 526. This approach guards against invalidating

unequal assessments resulting from genuine errors of judgment or mistaken information. In order to support a claim of discrimination, it is not enough for a taxpayer to show that a mere error in judgment occurred. He must show an intentional violation of the essential principle of practical uniformity. *Sioux City Bridge Co. v. Dakota County, Neb., supra.*

Additionally, the undervaluation does not have to be applied maliciously but can be unconstitutional even where the system is thought to be valid. In *Cumberland Coal Co. v. Board,* 284 U.S. 23, 24 (1931), this Court reinforced this view when it stated:

> There is no question that the assessments under review were made pursuant to a deliberately adopted system. The case is not one of mere errors in judgment in following a proper method (citations omitted), but one where the challenged discrimination resulted from a plan of assessment which was not the less systematic and intentional because of belief in its validity. (citations omitted).

The practice of the State of West Virginia in applying its *ad valorem* tax to real property is to assess the tax on the actual value of the property based on the value of consideration recited in the deed of sale. This method is systematically and intentionally followed and results in recently conveyed properties being taxed at higher values than those comparable properties which have not recently been sold. No error in judgment or a sporadic deviation causes this method to be undertaken, but rather, the assessments are consistently rendered in this fashion. What is sporadic is the way the tax assessor tries to alleviate the discrepancy in values by applying occasional *de minimis* adjustments to the value of comparable properties which are not conveyed. These random increases

in value demonstrates that West Virginia is aware of the disparities caused by its system of taxation. Since the West Virginia taxation practices are consistently applied and consistently result in disparate values being placed on comparable properties, this Court should declare that the taxation system in West Virginia violates the equal protection clause of the Fourteenth Amendment.

II.

THE COURT BELOW ERRED IN HOLDING THAT THE SOLE REMEDY AVAILABLE TO THE TAXPAYERS WAS TO SEEK TO RAISE THE ASSESSMENT OF ALL OTHER COMPARABLE PROPERTIES IN THE COUNTY.

The court below held that any taxpayer who contests the assessment of his property as excessive when it is based on market value will not be allowed a reduction in his assessment but must seek to raise the assessments of those taxpayers who own comparable properties. The lower court has advocated this remedy on more than one occasion as evidenced by the holding in *Killen v. Logan County Commission*, ___ W.Va. ___, 295 S.E.2d 689, 709 (1982) which states:

> In the future, taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced as long as their property is valued at market value. Instead, they should seek to have the assessments of other taxpayers raised to market value.

By placing the burden of seeking the remedy on the taxpayer, the decision of the lower court contravenes the precedent set by this Court in *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931) and *Hillsborough v. Cromwell*, 326 U.S. 620 (1946). In *Iowa-Des Moines*, this Court reiterated the well settled rule that a taxpayer who has been discriminated against should not have to

carry the burden of attempting to raise the taxes of his fellow taxpayer. This Court also held that the taxpayer did not have to wait for state officials to seek the increase of others' taxes but rather the taxpayer was allowed an immediate reduction in his own taxes of the excess. *Iowa-Des Moines*, 284 U.S. at 247.

This principle was again applied by this Court in *Hillsborough v. Cromwell, supra.* In this case, the taxpayer brought suit in federal court in New Jersey to have certain tax assessments declared invalid under the due process and equal protection clauses of the Fourteenth Amendment. It was noted, in the opinion of this Court, that the courts of New Jersey had long supported the remedy advocated by the lower court here today; that an aggrieved taxpayer's only recourse is to proceed against other members of his class in order to increase their taxes. This Court rejected the precedent set in New Jersey as being contrary to the established rule when it stated:

> The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. (citations omitted). *Hillsborough*, 326 U.S. at 623.

Moreover, this Court emphasized the weight of its decision by stating that in light of the examples set in the New Jersey courts "it is plain that the state remedy is not adequate to protect respondent's rights under the federal Constitution." *Hillsborough*, 326 U.S. at 624.

It is against these established principles that the Respondent would have this Court rule today. This Court ought not abandon its decisions in *Hillsborough* and *Iowa-Des Moines* by allowing the remedy advocated by the

lower court. The Petitioners must be permitted the benefit of the remedy set by this Court in *Iowa-Des Moines*; a reduction in their taxes of the excess. It has long been held by this Court that a reduction in taxes will be permitted for equity's sake even where this action goes against state statute. This was evidenced by the Court in *Cumberland Coal Co. v. Board*, 284 U.S. at 29, when it cited its longstanding decision in *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. at 446:

> This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.

By sustaining the decision of the lower court, this Court will be overturning precedent set at least fifty years ago. It will also be advocating the unequal and unjust discriminatory tax practice whereby taxpayers who have recently purchased property will be taxed at much higher values than those real property owners who have held on to their property. This Court will, by its decision today, decide whether real property can be freely sold and transferred or unjustly burdened by discriminatory tax assessment practices. Although NAR supports a system of taxation based upon the fair market value of property, NAR urges this Court to mandate equal treatment, whether by increasing the values of comparable properties in West Virginia or decreasing Petitioners' assessments. The equality mandated by the Fourteenth Amendment must be achieved to preserve the right and freedom to enjoy real property ownership.

CONCLUSION

For the foregoing reasons, the NATIONAL ASSOCIATION OF REALTORS®, as *amicus curiae*, submits that this Court should rule that the real property tax assessment practices of West Virginia are unconstitutional and that the decision of the West Virginia Supreme Court of Appeals be reversed.

Respectfully submitted,

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On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF AMICUS CURIAE OF THE NATIONAL TAXPAYERS UNION IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE NATIONAL TAXPAYERS UNION IN SUPPORT OF PETITIONERS

Having obtained the written consent of the parties pursuant to Rule 36.2 of this Court, the National Taxpayers Union respectfully submits the following brief as amicus curiae supporting the petitioners in urging this Court to reverse the judgment of the West Virginia Supreme Court of Appeals. Copies of the consent letters have been filed with the Clerk.

INTEREST OF THE AMICUS CURIAE

Achieving relief from discriminatory taxation, a central issue in this litigation, is one of the key goals of the National Taxpayers Union. The American political system relies heavily on the democratic process to control increases in government revenues. Discriminatory taxation provides opportunistic politicians with the chance to disassociate benefits from burdens, so that some people can enjoy the benefits while others bear the burdens. The National Taxpayers Union opposes inequitable taxation as an institutional arrangement that interferes with the democratic process and that is skewed to encourage government expansion.

The National Taxpayers Union has actively supported taxpayer efforts to control tax rates. The amicus has thus become intimately familiar with the frustration at rising tax liabilities that gave rise to tax limitation measures in various states, best known of which is California's Proposition 13. Calif. Const. Art. XIIIA (Appendix, infra). Proposition 13 features an assessment method similar to that challenged here. The National Taxpayers Union offers its views concerning the way that a decision by this Court defending tax uniformity may be reconciled with tax limitation measures.

Because the National Taxpayers Union's members have frequently challenged improper or illegal taxation, the amicus has a unique understanding of the difficult hurdles encountered by taxpayers in litigation. If the Court were to depart from its repeatedly reaffirmed precedent regarding the appropriate remedy for discriminatory taxation, taxpayer litigation could be seriously hampered.

The National Taxpayers Union was founded as a citizens' lobby by concerned taxpayers in 1969. It is a

nonprofit, nonpartisan membership organization devoted to protecting the interests of federal, state and local taxpayers through public education, lobbying and litigation on tax and spending issues. With members in all 50 states, the National Taxpayers Union represents over 150,000 taxpayers.

SUMMARY OF ARGUMENT

In this case, the Court addresses a property tax assessment method that systematically discriminates against newcomers and in favor of long-term landowners. Known as the "welcome stranger" method, the valuation approach essentially reassesses property only when it changes hands. As land values appreciate over time, the appraisal discrepancy between new and existing owners becomes more pronounced. In the current case, some newly reassessed tracts are valued for tax purposes 65 times higher than comparable properties.

The "welcome stranger" method is an unconstitutionally discriminatory vehicle for allocating tax liability, even when the divergence is not extreme. The defect in the reassessment on sale approach is that it consistently biases political decisionmaking. When some taxpayers bear a heavier portion of the community's tax burden than others, the benefited taxpayers have an incentive to support higher tax rates and greater governmental expenditures. They do not bear their full proportional burden; they can free ride at others' expense.

The analysis presented in the following brief establishes that uniformity is consistent with the goal of property tax limitation. The amicus urges this Court to reinvigorate its long-standing precedent preventing unconstitutional discrimination in allocating the burden of

taxation. The National Taxpayers Union believes that tax limitation need not be sacrificed in an effort to achieve uniformity. Accordingly, the National Taxpayers Union analyzes how the key features of these tax limitation measures can be retained while furthering uniformity.

The amicus urges the Court to adhere to the remedy of restoring equality of assessments by reducing the taxes of the complaining taxpayer. If taxpayers challenging inequitable taxes or assessments cannot obtain tangible judicial relief through a tax reduction, then there is no incentive and no mechanism to vindicate tax uniformity.

ARGUMENT

I. Uniformity Of Taxation Is An Essential Requirement Of Equal Protection, And An Assessment Method Must Produce Reasonable Uniformity

Taxation is the "means of distributing the burden of the cost of government." *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 508 (1936). The States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 526 (1959); *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 359 (1973). Thus the burden of taxation should be distributed according to principles of equality and uniformity. The concept of uniformity in taxation is so crucial that at least 45 state constitutions and the United States Constitution contain some form of tax uniformity clause. Moran, Is Everyone Paying Their Fair Share? An Analysis of Taxpayers' Actions to Equalize Taxes, 85 W. Va. L. Rev. 209, 212 (1983); U.S. Const. art. 1, sec. 8, cl. 1 (relating to duties, imposts, and excises).

The Fourteenth Amendment, however, does not require an "iron rule of equal taxation," *Bell's Gap R.R. v. Pennsylvania*, 134 U.S. 232, 237 (1890). Because of the difficulty of adjusting taxation so as to achieve exact equality, *LaBelle Iron Works v. United States,* 256 U.S. 377, 392 (1921), there is no constitutional need to maintain "precise, scientific uniformity." Allied Stores at 527.

The mere fact that a one-sentence rule can be enunciated defining the circumstances under which property valuations will be increased does not mean that constitutional uniformity has been achieved. It is not enough for the county assessor to claim that he "assessed all real estate that was subject to a recent transfer based upon fifty percent of the value contained in the declaration of consideration of value in the deed, without exception." Brief in Opposition to the Petition for a Writ of Certiorari at 2-3.

Contrary to the county's assertion, a discriminatory rule does not gain validity because it is applied without exception. Consistent application of some rules would certainly offend equal protection. For example, "A rule that says that all Jews must wear a yellow star has the same generality and clarity as one that says that all Jews are entitled to exemption from military service on the Sabbath. But there the similarity ends." Epstein, Beyond the Rule of Law: Civic Virtue and Constitutional Structure, 56 Geo. Wash. L. Rev. 149 (1987). Likewise, consistent application of a rule that benefits long-term landowners at the expense of newcomers cannot be upheld.

To fully analyze the uniformity question, we must consider the following factors:

(1) Whether newcomers and long-term landowners are sufficiently separate classes, so that the Webster County assessor may treat them differently without violating constitutional constraints.

(2) If so, whether this classification rests "upon some ground of difference having a fair and substantial relation to the object of the taxation." *Allied Stores*, 358 U.S. at 527; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37 (1928).

A. The "Welcome Stranger" Assessment Method Discriminates Between Taxpayers Who Are Arguably Within The Same Classification

The first step of this analysis is based on the concept that statutes should "bear equally on all who fall into the same class." *Atlantic and Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 424 (1937). But see *Carmichael v. Southern Coal Co.*, 301 U.S. at 509. Whatever ability a legislature or electorate might have to select the "welcome stranger" rule as a deliberate policy, the Court need not offer the same deference to a single errant public official. A "failure to assess all property taxed ad valorem at the same proportion of its value" is a denial of equal protection. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 539 (1933); *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23 (1931).

The West Virginia assessor's actions appear to fail the scrutiny under the first factor. State statutes do not specify such a distinction. The West Virginia Legislature has attempted to overcome inequities in assessments by requiring that a statewide re-appraisal be completed, and updated annually. Moran, supra, at 116, citing W. Va. Code sec. 18-9A-11 (1977). The state tax commissioner has issued guidance that would lead to more current valuations of property, but statewide guidance was ignored by the Webster County assessor. East Kentucky Energy Corp., et al., Petition for Certiorari, Appendix A at

34a-35a. The assessor's actions appear to have created a vast difference between landowners who were within the same class under state law.

While arguing that the challenged tax assessment amounts to an unauthorized discrimination between taxpayers who, under state law, should have been treated identically, can we simultaneously argue that this constitutes the "systematic and intentional" discrimination prohibited by the 14th Amendment? The question is clearly answered in the affirmative by *Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239 (1931). The facts in *Iowa-Des Moines* were very close to the West Virginia case in that the taxpayer-petitioner's tax was properly computed, but other taxpayers were undertaxed, and the tax collector's actions were not entirely consistent with state law. The court found that the unauthorized actions of a single errant tax collector can still amount to intentional and systematic discrimination in violation of equal protection.

Likewise, in *Liggett*, the Court held: "[W]here a statute lays a tax upon property ad valorem at an even and equal rate, discrimination may result from the fact that the assessing officials systematically and intentionally value some property subject to the tax at a proportion of its true value different from that fixed with respect to other like property." 288 U.S. at 539-40. Intentional and systematic discrimination may be distinguished from accidental and sporadic discrimination. The obvious rationale for the distinction is to avoid having isolated arithmetic or factual errors rise to the level of constitutional violations. The petitioners' suit is based upon the effect of a "rule" regarding reassessment of property, applied across the board. The discrimination is undoubtedly systematic.

There is only one problem with this analysis of whether the county assessor wrongly discriminated

bewteen those who were in the same class under state law and thus entitled to expect the same treatment. The problem is that the West Virginia Supreme Court of Appeals concluded to the contrary, i.e., both that the assessor's actions met the minimum requirements of state law and that the county assessor's actions did not constitute intentional and systematic discrimination. East Kentucky Energy Corp., et al., Petition for Certiorari, Appendix A, at 8a. The court's rationale is not clear, but it appears that the court meant that there was no discrimination as a matter of law, and could never be any discrimination so long as the taxpayer's property was not assessed above its market value.

Thus despite its seeming insufficiency, the county assessor's reassessment on sale technique cannot be discarded as a mere failure to properly observe state law classifications. Accordingly, we now turn to the second factor identified above, whether the classification itself is proper.

B. Classifications Created By The "Welcome Stranger" Assessment Method Are Not Reasonably Related To The Objects Of Taxation

A classification for tax purposes must not be arbitrary or capricious. The distinction must be based "upon a state of facts that reasonably can be conceived to constitute a distinction or difference in state policy." *Allied Stores* 358 U.S. at 530; *Kahn v. Shevin*, 416 U.S. 351 (1974). It must be based on some difference in the state's relation to the transaction, not just to the owner's residence. 358 U.S. at 530. The Court will strike down a tax if it is "unable to discover any reasonable basis" for a tax classification. *Liggett*, 288 U.S. at 539.

The recent case of *Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862 (1985), raised the same kinds of newcomer v. old-timer conflict addressed herein. The Court in *Hooper* found that a distinction between veterans moving to New Mexico before 1976 and those moving there after that time was not rationally related to a tax exemption's asserted purpose. "This case involves a distinction between residents based on when they first established residency in the State." 105 S. Ct. 2866 n.6. The Court examined whether the residency classification bore a rational relationship to the legislative objectives, and concluded that it did not. The Court emphasized the impropriety of favoring long-time citizens. "The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their [later] arrival . . ." *Id.* at 2869.

The *Hooper* decision relied heavily on *Zobel v. Williams*, 457 U.S. 55 (1982), which likewise concerned new residents who had been disadvantaged relative to longer term residents. As the *Hooper* opinion noted, "*Zobel* made clear that the Constitution will not tolerate a state benefit program that 'creates fixed, permanent distinctions . . . between . . . classes of condededly bona fide residents, based on how long they have been in the State." *Hooper,* 105 S. Ct. at 2869, quoting 547 U.S. at 59.

The only grounds for distinguishing these cases from the instant controversy is that the prior cases discriminated between people based on the date of residency, while West Virginia has selected the date of property acquisition. The dangers of political favoritism remain the same. Such transparent favoritism cannot serve as a legitimate state interest.

The West Virginia tax currently challenged was to provide general government services. Differentiating between new and existing landowners does not serve any apparent function in furthering the purposes of the tax. There is no nexus between the length of time a property has been owned by the taxpayer and the appropriate distribution of the burden of supporting government. Furthermore, the county has not asserted that newcomers place any greater burden on government services than long-time residents. Even if this were an asserted purpose, a permanently continuing tax differential based on the length of property ownership would not serve this purpose. See *Hooper*, 105 S. Ct. at 2868.

Because neither the West Virginia Legislature nor Supreme court have identified the state interests underlying the "welcome stranger" approach, it may be helpful to consider the rationale enunciated for the reassessment on sale valuation method in the context of California's Proposition 13. Calif. Const. Art. XIIIA (Appendix, *infra*).

The California Supreme Court upheld Proposition 13 against an equal protection challenge in *Amador Valley Joint Union High School District v. State Board of Equalization*, 149 Cal. Rptr. 293, 583 P.2d 1281 (1978). The court said the reassessment on sale approach "finds reasonable support in a theory that the annual taxes which a property owner must pay should bear some rational relationship to the original cost of the property, rather than relate to an unforeseen, perhaps unduly inflated, current value." 583 P.2d at 1293. Property owners, the court said, can estimate their future tax liability under Proposition 13 with some assurance. A subsequent purchaser is assessed at a rate that reflects "the price he is willing and able to pay for that property." *Id.* The

acquisition value is based on "the owner's free and voluntary acts of purchase." *Id.*

Do these identified purposes constitute legitimate state interests? Significantly, the statement of purposes does not relate to the "object of the taxation." *Allied Stores*, 358 U.S. at 527. There is no attempt to consider whether taxpayers are assessed differently to address any special burden (e.g., if new residents generated additional expenses for counties) or benefit (such as expenditures that would particularly benefit new landowners). Nor is there any attempt to identify characteristics (such as wealth, age, or corporate v. individual status) distinguishing new owners from old.

The California court's analysis instead rests on vague expectations about predictable rates of taxation. While sudden increases in tax bills are a concern shared by the National Taxpayers Union, they are not a justification for forcing some people to bear a disproportionately large share of the costs of government. The concern is more appropriately addressed by limiting taxes for all citizens.

C. The "Welcome Stranger" Assessment Method Creates Undesirable Political And Economic Incentives

The situation created by the "welcome stranger" approach is attractive to local politicians. Despite statutory and state constitutional directives requiring uniform assessments, tax assessors have frequently diverged from assessing property at the current market value. See, e.g., Moran, *supra* at 214-17. The Supreme Court pondered this enigma in an early case: "[I]f we look for the reason for this common consent to substitute a custom for the positive rule of the statute, it will probably be found in the difficulty of subjecting . . . property . . . to

the inspection of the assessor and the grasp of the collector." *Cummings v. Merchant's National Bank,* 101 U.S. 153, 163 (1879).

Another reason for the recurring incidence of "welcome stranger" assessments is the political benefit. It permits officials to acheive wealth transfers "with relative invisibility and thus relative immunity from normal democratic processes." *Pennell v. San Jose,* 56 U.S.L.W. 4168, 4173 (1988) (J. Scalia, concurring in part and dissenting in part). The current owners, who are favorably treated, are currently within the taxing authority and able to participate in the democratic processes that control allocation of the tax burden. The group who suffers discrimination are likely to be excluded from political participation in the local taxing authority when the rule is established. In short, reassessing only new purchases pleases the voters at the expense of non-voters (or at least a minority of voters).

Recent cases regarding discrimination against interstate commerce, such as *Metropolitan Life Insurance Company v. Ward,* 470 U.S. 869 (1985), are not directly relevant here because the class of new property purchasers is not facially limited to out-of-state residents. *CTS Corporation v. Dynamics Corporation of America,* 107 S. Ct. 1637, 1649 (1987). The rationale is nevertheless very similar. Discrimination against non-residents is dangerous because the non-resident is excluded from the political process and thus cannot defend his interests.

Economic analysis also challenges the reasonable basis for an assessment method that excessively burdens transfers of title. Such a method malapportions taxes across properties of like value and results in substantial losses. Transfers of property are discouraged because increased taxation serves to increase the selling price. Buyers must essentially pay a higher price for property,

and so they will be less willing to buy. Many socially beneficial sales will not take place. Ultimately, the system could lead to economic stagnation.

The National Taxpayers Union wishes to conclude this discussion by reaffirming the importance of the tax limitations contained in Proposition 13, and particularly the two percent ceiling on increases in assessments. The original purposes of the proposition would continue to be served, even if its discriminatory provisions were severed. See Calif. Const. Art. XIIIA, sec. 6 (Appendix, *infra*). Obviously, the severability of California's Proposition 13 is not before the Court at this time. But the major impact of this Court's decision may not be felt in West Virginia, where the legislature has already mandated that new assessments bring all property valuations up to date. The decision may potentially impact billions of dollars worth of property subject to the "welcome stranger" form of assessment. For this reason, the National Taxpayers Union has extrapolated beyond the current issues to examine whether a Supreme Court decision upholding uniformity will necessarily frustrate citizen attempts to limit taxation.

We conclude that holding the "welcome stranger" assessment method unconstitutional would further the goals of reasonable and equitable taxation. The problem of excessive increases in property taxation can be controlled without resorting to discriminatory taxation.

Ii. Reducing An Assessment To An Amount Equal To Average Assessments Remains The Appropriate Remedy For An Equal Protection Violation

This Court has, for many years, consistently ordered the same remedy to vindicate unconstitutionally

discriminatory assessments. The proper remedy is to lower the individual taxpayer's tax until it is in line with everyone else's. The taxpayer does not need to adjust everyone else's taxes upward to remedy discriminatory taxation.

"The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well-settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. . . . The petitioners are entitled to obtain in these suits refund of the excess of taxes exacted from them." *Iowa-Des Moines National Bank,* 284 U.S. at 247.

The West Virginia Supreme Court failed to recognize this long-standing precedent. The Petition for Certiorari of East Kentucky Energy Corp., et al., at 25, points out that other state courts have likewise disregarded the constitutionally required remedy. The Supreme Court should not waver from adhering to a remedy that is firmly grounded in legal theory and fairness, and creates a beneficial incentive structure.

A taxpayer's rights to non-discriminatory taxation are adequately vindicated if everyone else's taxes are raised to his level of taxation. *Hillsborough v. Cromwell,* 326 U.S. 620, 623 (1920). But the state cannot constitutionally restrict the remedy to contesting others' tax assessments and forcing them to be raised. *Iowa-Des Moines National Bank,* 284 U.S. at 247.

Webster County asserts that the Court diverged from its precedent in *Louis K. Liggett Co. v. Lee,* 288 U.S. 517 (1933). This view is mistaken. *Liggett* acknowledged the

general remedy rule. 288 U.S. at 539-40. It found the rule inapplicable where (1) the allegation is that some people are paying no taxes because of official oversight, and (2) state law provides a mandamus action to force collection. In such a case, plaintiffs cannot avoid paying taxes. The remedy is clearly supported by *Ligget,* but is limited to situations of "unequal and discriminatory *assessment*". Id. at 540 (emphasis added). That is exactly the situation the Court faces here.

The remedy of forcing the individual taxpayer to seek increases in everyone else's taxes presents the danger of courts taking over the running of taxing authorities to assure diligence in compliance. In West Virginia, if a taxpayer successfully pursued a mandamus remedy, the courts would have to oversee multi-year backlogs of unassessed property in order to provide a meaningful remedy. On a nationwide basis, the courts would face staggering administrative problems in determining whether a sufficient level of equality had been achieved. Lowering the individual litigant's tax gives the agency an incentive to mend its ways or face many more taxpayer suits, but does not involve judicial supervision.

If taxpayers must proceed by challenging their neighbors' disproportionately low assessments in individual proceedings, the enormous uncompensated financial burdens would form a barrier against challenging inequitable taxation. See Moran, *supra.* If the taxpayer has no hope for reducing his own taxes, then inequitable taxation would almost always remain unchallenged.

CONCLUSION

For the foregoing reasons, The National Taxpayers Union urges this Court to reverse the decision of the West Virgina Supreme Court of Appeals.

Respectfully submitted,

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APPENDIX

California Constitution Article XIIIA

(Proposition 13)

Section 2. Full cash value; reassessment; newly constructed property; seismic safety; value of replacement dwelling; full cash value base; change in ownership; family transfers

(a) The full cash value means the county assessor's valuation of real property as shown on the 1975-76 tax bill under "full cash value" or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 full cash value may be reassessed to reflect that valuation.

* * * *

(b) The full cash value base may reflect from year to year the inflationary rate not to exceed 2 percent for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction, or may be reduced to reflect substantial damage, destruction or other factors causing a decline in value.

* * * *

Section 6: Severability

If any section, part, clause, or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected but will remain in full force and effect.

Nos. 87-1303 and 87-1310

Supreme Court, U.S.
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October Term, 1987

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On Writs of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF AMICI CURIAE, PACIFIC LEGAL FOUNDATION, PAUL GANN, AND CALIFORNIA TAX REDUCTION MOVEMENT, IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation, Paul Gann, and California Tax Reduction Movement respectfully submit this brief amicus curiae in support of respondent. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation has consistently supported the vigorous enforcement of tax reform measures, including California's Proposition 13. The Foundation has participated in most of the significant litigation regarding Proposition 13 since its enactment by California voters in 1978. This thorough knowledge of tax reform efforts allows the Foundation to present a unique public policy perspective to this Court.

Paul Gann is a California citizen and taxpayer. He is president of People's Advocate, Inc., an organization dedicated to the protection of taxpayers' interests. He is a coauthor of California's Proposition 13, an initiative

adopted by California voters in 1978 to reform that state's property tax system.

The California Tax Reduction Movement (CTRM) is a nonprofit, tax-exempt California corporation. It was organized in 1978 by the late Howard Jarvis, a coauthor of Proposition 13. CTRM was organized for the express purpose of defending the tax reduction benefits of Proposition 13. CTRM has some 200,000 members, who actively support its ongoing tax reduction efforts.

Amici's participation in this case stems from their support for California's Proposition 13. Amici support the discretion of the states to determine tax policy independently. This discretion must include the ability to adopt a property tax assessment system such as that contained in Proposition 13. Amici share respondents' concern for the freedom of the states to determine tax policy. The public policy concern and litigation experience brought to this case by amici will help provide this Court with additional arguments relevant to the proper resolution of this matter.

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported as *In re 1975 Tax Assessments Against Oneida Coal Company*, 360 S.E.2d 560 (W. Va. 1987).

STATEMENT OF THE CASE

These consolidated cases concern the discretion of the states to determine their own policies independently

with regard to property taxation. These cases arise out of property tax challenges brought by several coal companies in West Virginia. In 1974 the Allegheny Pittsburgh Coal Company purchased 7,374 acres of coal property in fee simple, including surface, minerals, and various combinations of surface and mineral interests. Allegheny Pittsburgh paid a total of $24,624,500 for this property. Webster County, West Virginia, in which the property was located, assessed the property for the tax years 1976 to 1983 at $12,312,250, 50% of the purchase price.[1] *In re 1975 Tax Assessments Against Oneida Coal Company*, 360 S.E.2d at 562.

Allegheny Pittsburgh sold its property in Webster County to East Kentucky Energy Corporation for $29,842,500 on July 15, 1982. From that time on Webster County assessed the property at $14,921,250, 50% of the price for which East Kentucky Energy purchased the property. *Id.*

The other property at issue in these cases was owned successively by the Shamrock Coal Company and Oneida Coal Company. Both of these companies are subsidiaries of Elk River Resources, Inc. Shamrock transferred 7,783 acres of coal in Webster County to Oneida on May 12, 1981. No consideration changed hands because both companies were subsidiaries of the same parent. The assessed

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[1] The West Virginia Constitution requires that property be assessed for tax purposes at 60% of its full cash value. W. Va. Const. Art. X, § 1(b). This constitutional provision was enacted in 1982. Prior to that time property was assessed at 50% of value pursuant to West Virginia Code § 18-9A-11(f).

valuation of this property was derived from the price paid when Shamrock purchased the property in 1977. *Id.*

By regular practice Webster County automatically reassessed any property transferred based on its market value at the time of transfer. Other property in the county was reassessed by raising assessed valuation by 10% once every four to six years. *Id.* at 563.

The coal companies argued below that the practice of reassessing property transferred, based on market value at the time of transfer without also reassessing other similar property, violates the West Virginia Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Without discussing the federal claim, the Supreme Court of Appeals of West Virginia concluded that "the consideration paid by the appellees represents 'the true and actual value' of their respective properties . . . ." *Id.* at 564. The court therefore rejected the coal companies' claims.

The coal companies petitioned this Court for writs of certiorari. The petitions were granted on March 28, 1988, and consolidated for review. The coal companies now argue that anytime a state adopts a system by which property is reassessed on transfer, without also reassessing other comparable property, equal protection is violated. Amici contend that this argument is overbroad and would operate to nullify property tax systems proven to protect home owners from large yearly increases in their tax burdens based on increased "paper" value.

SUMMARY OF ARGUMENT

This Court has long acknowledged the wide discretion of the states to determine independently the policies underlying their systems of property taxation. States may adopt many different policy goals in establishing a property tax system. The Fourteenth Amendment to the United States Constitution does not establish an absolute rule that all comparable property must be taxed equally. States may adopt goals other than taxation based on current value. For example, California has determined that unrealized paper increases in the value of property should not be taxed and, therefore, has adopted a policy of reassessing property only when transferred, newly constructed, or, in a limited way, for inflation.

Amici take no position with respect to the policies underlying Webster County's tax assessment practices. Amici's sole concern is that the coal companies' arguments be rejected to the extent that those arguments would impinge upon the ability of the states to set forth reasonable taxation policies, such as those embodied in California's Proposition 13. Equal protection does not demand an iron rule of equal taxation. Distinctions created between different classes of property owners, so long as allowed by state law, must be upheld if rationally related to a legitimate state policy objective.

ARGUMENT

I

THE STATES MAY EXERCISE WIDE DISCRETION IN SETTING THEIR OWN POLICIES REGARDING PROPERTY TAXATION

These consolidated cases represent a challenge by four coal companies to the system of property tax assessment employed by Webster County, West Virginia. The coal companies argue that Webster County's system of reassessing property when transferred, without also reassessing other comparable property, violates their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Amici will demonstrate that this argument is overbroad and neglects the possibility that the states have a legitimate policy reason for their particular tax systems.

Decisions of this Court over the past century make unmistakably clear that states have broad discretion in setting their own tax policies. Differences in treatment between taxpayers do not violate equal protection where those differences result from a reasonable distinction in state policy. *Kahn v. Shevin*, 416 U.S. 351, 355 (1974).

Amici do not address the policies underlying property tax assessment in Webster County.[2] The argument of

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[2] The coal companies concede that the states may create classifications among different types of property. Joint Brief for Petitioners at 23-24. Amici concur. The extent of the states' policy making discretion merits elaboration. As amici will demonstrate, the states may adopt systems of taxation based on policies other than equal taxation based on current market value. The states are free to adopt wholly unique concepts of what a property tax system should entail. *See Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208, 235, 149 Cal. Rptr. 239 (1978).

the coal companies must nevertheless be rejected to the extent that it purports to find in the Fourteenth Amendment a limitation on the discretion of the states to set policies that draw reasonable distinctions between taxpayers, so long as those distinctions are consistent with the state's constitution.

The decision of this Court in *Kahn* strongly supported this analysis when it concluded that "[a] state tax law is not arbitrary although it 'discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution. This principle has weathered nearly a century of Supreme Court adjudication . . . ." *Id.* (citations omitted; footnote omitted). That case involved a Florida property tax exemption for widows only. The exemption was not allowed for widowers, and a man whose wife had died challenged this distinction on equal protection grounds. *Id.* at 352. The Court found that the different treatment of widows and widowers " ' "rest[ed] upon some ground of difference having a fair and substantial relation to the object of the legislation." ' " *Id.* at 355 (citations omitted).

This analysis can be traced back at least as far as *Bell's Gap Railroad Company v. Commonwealth of Pennsylvania*, 134 U.S. 232 (1890). The Court there concluded that "the XIVth Amendment was not intended to compel the States to adopt an iron rule of equal taxation." *Id.* at 237. The states may adopt distinctions between parcels of property of similar value, "so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution." *Id.*

States may wish to create distinctions in their property tax systems for a wide variety of policy reasons. In 1978 California voters enacted Proposition 13, an initiative measure that added Article XIIIA to the California Constitution. Among other things, Proposition 13 provided that property would be assessed at its 1975-1976 value, and reassessed later only when transferred, newly constructed, or, in a limited manner, for inflation.[3] Cal. Const. Art. XIIIA, § 2. Although this system results in some property being assessed at different values from other property of the same current market value, it is clearly supported by a rational public policy choice.

This system results from a decision that property taxes should be firmly grounded in the original cost of the property, and should not tax unrealized paper gains in the value of the property. *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d at 235. As the California Supreme Court explained, reassessing property only on transfer may advance a policy of predicating taxes on the owner's free and voluntary act of purchase. *Id.* Taxpayers are treated equally because each is taxed based on the price they willingly pay for property, and none are taxed on mere paper increases in value after that time.

> "Not only does an acquisition value system enable each property owner to estimate with some assurance his future tax liability, but also the system may operate *on a fairer basis than a current value approach*. For example, a taxpayer who acquired his property

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[3] Proposition 13 allows county assessors to reassess property for inflation not to exceed 2% per year. Cal. Const. Art. XIIIA, § 2(b).

> for $40,000 in 1975 henceforth will be assessed and taxed on the basis of that cost . . . . This result is fair and equitable in that his future taxes may be said reasonably to reflect the price he was originally willing and able to pay for his property, rather than an inflated value fixed, after acquisition, in part on the basis of sales to third parties over which sales he can exercise no control. On the other hand, a person who paid $80,000 for similar property in 1977 is henceforth assessed and taxed at a higher level which reflects, again, the price he was willing and able to pay for that property." *Id.* (emphasis added).

California has adopted a system that limits the year by year tax increases on property. Cal. Const. Art. XIIIA, § 2. This state policy prevents a property owner from being confronted with rapidly increasing property taxes as a result of an increase in market value that is of no benefit to the property owner until time of sale. California declines to tax the potential gain that might result if property were sold.

Relying on this policy basis for the differences in assessments, the California court upheld Proposition 13 from an equal protection challenge. The wide flexibility permitted the states in adopting tax policies dictated that the court uphold a system supported by a rational basis. *Amador*, 22 Cal. 3d at 234. Absolute adhesion to current value is not the only policy objective a state may pursue.

Properties of the same current market value may also be taxed differently for other reasons. For example, a state may decide to tax property differently based on the use of the land. *Howell v. Malone*, 388 So. 2d 908, 913 (Ala. 1980). A policy of preserving agricultural and forest land from development justifies assessing such property at a lower rate than other property of the same current

market value. *Weissinger v. White*, 733 F.2d 802, 806-07 (11th Cir. 1984). Many states have a policy of taxing farmland at a lower rate in order to encourage the preservation of agricultural uses.[4]

States may tax different properties in different ways, where the distinction is rationally related to a legitimate state policy.[5] *State Board of Tax Commissioners of the State of Indiana v. Jackson*, 283 U.S. 527, 536 (1931).

> "The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation . . . . The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, or if any state of facts reasonably can be conceived to sustain it." *Id.* at 537 (citations omitted).

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[4] Differing approaches to this policy include those of California, which allows property owners and local governments to enter into contracts by which land is restricted to agricultural uses in return for a lower tax assessment, California Government Code § 51200, *et seq.*, and Montana, which provides that the value of agricultural land shall be determined only with regard to its value for agricultural uses, and not based on its potential for development. Mont. Code Ann. § 15-7-201, *et seq.* (1987).

[5] The states' discretion is limited by the options available under its own state constitution. Obviously, if a policy is prohibited by the state constitution, it is not a legitimate state interest for purposes of the rational basis test.

Taxation is "the most plenary of sovereign powers." *Lawrence v. State Tax Commission*, 286 U.S. 276, 279 (1932). The states' discretion is wide indeed. For example, in 1970 Illinois abolished all ad valorem personal property taxes as to individuals, but retained those taxes as to corporations. *Lehnhausen v. Lake Shore Auto Parts Company*, 410 U.S. 356, 357 (1973). Lake Shore Auto Parts Company, a corporation, claimed the distinction violated its equal protection rights. *Id.* at 357-58. The Supreme Court concluded that a tax system will be upheld unless "palpably arbitrary" or "invidious." *Id.* at 360. The Court reasoned that "[t]he Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination . . . ." *Id.* at 359 (citations omitted). Furthermore, "[t]here is a presumption of constitutionality which can be overcome 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' . . . 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' " *Id.* at 364 (citations omitted).

Amicus, National Taxpayers Union (NTU), appears to believe that the states' discretion in setting tax policy is limited to considerations directly related to revenue collection and expenditure. Brief of amicus curiae, National Taxpayers Union, at 10-11. NTU criticizes California's Proposition 13 on this ground, but it is clear that Proposition 13 directly addresses the legitimate concern that taxation based on the rapidly increasing paper value of

property can cause extreme hardship on those whose incomes do not rise as rapidly as real estate values.

More importantly, no such subject matter limitation restricts the policies the states may pursue through the mechanism of tax statutes. NTU appears to believe that the states may not pursue policies through their tax systems unless those policies relate specifically to the benefits and burdens imposed by the tax system. State and federal governments use tax statutes to further a wide variety of policy concerns. Many income tax deductions are policy statements intended to advance various social goals through the tax system.[6] Beneficial property tax treatment of agricultural land advances a policy of preserving agricultural uses, without relation to specific benefits and burdens on the tax system. *Weissinger*, 733 F.2d at 806-07. A classification may not amount to "hostile and oppressive discrimination," *Lehnhausen*, 410 U.S. at 359, but that does not mean the classification may not serve a policy goal not strictly related to tax collection. Tax legislation may have as its object the advancement of social policy independent of the relative burdens taxpayers may place on the taxing entity. *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983) (upholding policy of allowing an income tax exemption only for educational institutions that do not discriminate based on race).

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[6] Examples include promoting home ownership through mortgage interest deductions, 26 U.S.C. § 163(h), and encouragement of employers to build child care facilities for employees by providing special amortization rules. 26 U.S.C. § 188.

NTU's main objection to Proposition 13, and therefore its reason for involvement in this case, is that it does not agree with the policy choice made by California voters in enacting the initiative. The remedy for a disagreement over policy is to pursue democratic change. Such disagreement has nothing to do with the discretion of the states to make the policy in the first place.

The mere fact that Webster County's assessment practices result in unequal assessments depending on when the property was transferred, without more, does not establish an equal protection violation. Equal protection does not *confine* the states to a system of taxation based on current value. *Amador*, 22 Cal. 3d at 235. States may decide that property owners should not be taxed on unrealized paper gains in the value of their property, and so reassess property only on transfer, as California did by adopting Proposition 13. So long as the assessment system is rationally related to a legitimate state interest, equal protection is not violated.

II

CASES IN WHICH STATES HAVE ADOPTED POLICIES OF TAXING PROPERTY BASED ON CURRENT VALUE DO NOT LIMIT THE DISCRETION OF THE STATES TO PURSUE OTHER POLICIES

The coal companies rely heavily on two decisions of this Court for the proposition that any property tax assessment system that results in similar property being taxed differently violates the Fourteenth Amendment. In *Sioux City Bridge Company v. Dakota County*, 260 U.S. 441 (1923), the Supreme Court considered an equal protection challenge regarding the assessment of a railroad bridge in

Nebraska. The owner had alleged that the bridge had been assessed at its full value while other properties had been assessed at only 50% of market value. Nebraska law created a right to equal taxation based on current market value of the property. *Id.* at 444. While this Court held in favor of the bridge owners, *id.* at 445, the decision did not confine the states to a system of rigidly equal taxation without regard for the policy prerogatives of the states. That decision involved Nebraska constitutional and statutory provisions mandating taxation based on current value. *Id.* at 444.

Sioux City Bridge did not deal with the question of whether equal protection had been violated, but rather with the proper remedy for any violation that may be proved. This Court made no ruling as to whether an equal protection violation had occurred. *Id.* at 447. As the Court stated, "[t]he [Nebraska] supreme court does not make it clear whether it thinks the discrimination charged was proved or not, but, *assuming the discrimination,* it holds that the Bridge Company has no remedy except 'to have the property assessed, below its true value raised, rather than to have property assessed at its true value reduced.' " *Id.* at 445-46 (emphasis added). The Court then went on to discuss at length whether the property taxed at its true value should have its assessments reduced or the property assessed at below its value should have its tax levy raised. *Id.* This question differs markedly from whether equal protection had been violated in the first place.

The coal companies also rely heavily on *Cumberland Coal Company v. Board of Revision of Tax Assessments,* 284 U.S. 23 (1931). That case involved coal land that was

automatically assessed at the same value per acre regardless of how close the coal was to the river which provided its transportation to market. The value of the coal land in fact varied greatly depending upon its accessibility to the river. *Id.* at 24-26. This Court's decision that this practice violated equal protection did not limit the discretion of the states to set tax policy. The assessment practice at issue in *Cumberland Coal* did not relate to any policy adopted by the state. The coal land was assessed at a uniform value apparently as a matter of administrative convenience, rather than in pursuit of any substantive policy. *See id.* at 26.

The state court decisions relied upon by the coal companies in their opening brief also do not establish an absolute rule that states cannot adopt a policy supporting reassessment on transfer. Rather, they involve state law guarantees of equal taxation without regard for when the last transfer of the property took place. *Ernest W. Hahn, Inc. v. County Assessor*, 92 N.M. 609, 592 P.2d 965, 967 (1978). The same is true of *Sparks v. McCluskey*, 84 Ariz. 283, 327 P.2d 295 (1958), in which the decision on an earlier appeal made clear that the state constitution mandated equal taxation based on current value, foreclosing other policy objectives.[7] *McCluskey v. Sparks*, 80 Ariz. 15, 291 P.2d 791, 793 (1955).

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[7] The state court decisions cited by the coal companies in their petitions for certiorari also involved state constitutional provisions restricting taxation to a current value basis. *Rocky Mountain Oil and Gas Association v. State Board of Equalization*, 749 P.2d 221, 223-24 (Wyo. 1987); *Boothe Financial Corporation v. Lindley*, 6 Ohio St. 3d 247, 452 N.E.2d 1295, 1297 (1983); *State ex rel. Douglas v. State Board of Equalization*, 205 Neb. 130, 286 N.W.2d 729, 731 (1979); *Board of Assessors of* (continued)

As the California Supreme Court has observed, such cases cannot "purport to confine the states to a current value system under equal protection principles or to state an exception to the general rule . . . that a tax classification or disparity of tax treatment will be sustained so long as it is founded upon some reasonable distinction or rational basis." *Amador*, 22 Cal. 3d at 235. The Ohio Supreme Court has stated that "the different treatment of similarly situated taxpayers does not violate equal protection as long as there is a rational basis for that treatment." *Boothe Financial Corporation v. Lindley*, 6 Ohio St. 3d 247, 452 N.E.2d 1295, 1298 (1983).

This Court has made abundantly clear the rule that equal protection allows the states to create distinctions in their tax policies where rationally supported by a legitimate state purpose. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985).

Prior cases clearly demonstrate that the coal companies have overstated the law of equal protection in asserting that all systems by which similar property is taxed differently must be unconstitutional. The states are free to adopt policies seeking to advance other goals than strict uniformity. *F. S. Royster Guano Company v. Commonweath of Virginia*, 253 U.S. 412, 415 (1920). As one state court has observed, the decisions of this Court regarding equal protection challenges to taxes may be neatly

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Weymouth v. Curtis, 375 Mass. 493, 378 N.E.2d 655, 658 (1978); *District of Columbia v. Green*, 310 A.2d 848, 855 (D.C. 1973); *Southern Bell Telephone and Telegraph Company v. County of Dade*, 275 So. 2d 4, 8 (Fla. 1973).

divided into two categories. *Rocky Mountain Oil and Gas Association v. State Board of Equalization*, 749 P.2d 221, 233 (Wyo. 1987). The first category includes those cases, such as *Lehnhausen* and *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), in which the distinctions created by the state tax system were allowed by, or at least not prohibited by, state law. *Rocky Mountain Oil and Gas*, 749 P.2d at 233. The second category includes those cases, such as *Sioux City Bridge* and *Cumberland Coal* in which state law created an entitlement to equal taxation. *Rocky Mountain Oil and Gas*, 749 P.2d at 234. Those cases in the first category upheld distinctions rationally related to legitimate state policies. *See, e.g., Lehnhausen*, 410 U.S. at 359. Equal protection has barred distinctions between property of comparable value only where unsupported by any public policy goal and where contrary to a right of equal taxation embodied in state law. *See, e.g., Sioux City Bridge*, 260 U.S. at 444-45.

CONCLUSION

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution affords states great discretion in setting state tax policy. The states are not confined to a rigid rule of equal taxation. The states may, unless prohibited by their state constitutions, adopt policies that pursue goals other than rigid equality of taxation.

The coal companies assert that any system by which property is reassessed on transfer without also reassessing other comparable property violates equal protection. This argument must be rejected to the extent that it

restricts the freedom of the states to adopt their own tax policies. The states are free to adopt policies that pursue other goals. An example of such a goal is California's Proposition 13, which declines to tax unrealized paper increases in the value of real property. Preservation of the vital discretion of the states to adopt their own tax policies demands that this Court recognize the ability of the states to pursue unique policy goals. The states need not march in lockstep uniformity behind the banner of current value. This Court should therefore reject the coal companies' contention that reassessment of property on transfer, without reassessing other comparable property, must violate equal protection.

DATED: July, 1988.

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Nos. 87-1303 and 87-1310

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Respondent.

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ONEIDA COAL COMPANY, INC., AND
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On Writs of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the West Virginia Supreme Court of Appeals properly concluded that the record failed to establish a violation of petitioners' rights under the Equal Protection Clause by the County's reliance on recent sales prices to assess the value of property for *ad valorem* tax purposes.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

Property taxes are an important source of revenue and a vital policy instrument for state and local governments. This case presents a challenge to a system of property assessment that has been commonly used by state and local government taxing authorities throughout the country. The County Assessor for Webster County, West Virginia, annually reviews real estate assessments, and, when a parcel of real estate is sold, adopts the purchase price as the reasonable value of the property.

Petitioners contend that taxing their property on the basis of acquisition price denies them equal protection of the laws so long as other property in the vicinity, which has not been sold, is taxed on the basis of valuations unadjusted for recent sales price information. They argue that the price they paid—plainly the most accurate current measure of the value of their property—cannot be used as the basis of an assessment for tax purposes unless the assessment of all other property in the vicinity is contemporaneously adjusted.

Petitioners do not allege that they have been treated differently from other purchasers of property in the County, or that their property is assessed at a higher percentage of its valuation than other property. They assert only that the reassessment of their property based upon the price at which they purchased it is somehow discriminatory. The only "discrimination" that has occurred is that petitioners voluntarily purchased property at a price above its previously assessed valuation, and that their assessments were raised accordingly. The County's differentiation among properties on the basis of the most recent sale price is justified by considerations of

fairness, administrative convenience and expense and thus satisfies the rational basis test of the Equal Protection Clause; there is no suggestion that petitioners fall within a suspect classification that would trigger more exacting scrutiny.

If the Court were to adopt petitioners' theory, it would impose an intolerable burden on state and local tax assessors. Every time that property is sold for a price above its previously assessed value, the assessor would be forced to determine whether any other properties within the jurisdiction are comparable to the property that has been sold and, if so, to what extent the assessment of such comparable properties should be adjusted to reflect the recent sale. As a practical matter, no taxing authority could meet those burdens where, as here, the properties at issue are not readily comparable condominium units or neighborhood homes but rather vast tracts of land that differ both in terms of size and in terms of the nature and extent of proven and unproven subsurface mineral reserves. In addition, petitioners' theory of assessment would expose the taxing authority to endless contests concerning the reassessment of unsold properties to reflect the equivalent of an unrealized (and perhaps unrealizable) capital gain.

The assessor's alternative, according to petitioners, is to reduce the assessment based on their purchase price to the level of other unsold properties. Such a reduction would not only result in extensive revenue loss, but would also deny the taxing jurisdiction the right to assess property on the basis of the most probative and least costly evidence.

Amici submit that petitioners have failed to demonstrate that the practices of the Webster County Tax Assessor are constitutionally discriminatory. Because this Court's decision will have a direct and profound effect on matters of prime importance to *amici* and their mem-

bers, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

The State of West Virginia imposes a tax upon the ownership of property. The amount of the tax is based upon the "true and actual value" of the property, and the responsibility for appraisal is delegated to county assessors who appraise the value of properties within their jurisdictions and apply rates fixed by the state constitution to arrive at the assessed valuation. The tax is then calculated as a percentage of the assessed value of the property.

The County Assessor for Webster County, West Virginia, has chosen to rely in part upon market forces to determine the appraisal value of properties in that County. During the relevant time period, the county assessor based the assessment value of transferred real property on the acquisition price. The county assessor testified that property that had not been recently transferred was reassessed in 1976, 1982, and 1984 with uniform increases of ten percent on each occasion; petitioners argued below that the assessor did not apply the ten percent increase uniformly to all relevant properties. Pet. App. 6a, 27a-28a; EKE Pet. App. 58a.[2]

Petitioners own over fifteen thousand acres of valuable coal property in Webster County. Allegheny Pittsburgh purchased 7300 acres of Webster County coal property in 1974 for $24.6 million; it sold that coal property to East Kentucky Energy in 1982 for $29.8 million. Shamrock Coal purchased almost 7800 acres of Webster

[1] The parties' letters of consent pursuant to Rule 36 of the Rules of the Court have been filed with the Clerk.

[2] References in this brief to the appendices of the separate petitions for certiorari follow the abbreviation convention used in the Joint Brief for Petitioners ("Joint Brief").

County coal land in 1977 as part of a larger transaction involving coal property, coal leases, and options in three West Virginia counties. The Webster County Assessor appraised the Webster County portion of the property at $5.9 million. In 1981, Shamrock Coal conveyed the Webster County property to a sister corporation, Oneida Coal, without cash consideration.

Within two years of three of these four transfers, the county assessor reassessed petitioners' parcels to reflect the acquisition prices.[3] Petitioners protested these reassessments to the Webster County Commission beginning in 1976.[4] The county commission denied relief, and petitioners appealed the adverse decisions for the years 1976 through 1985. The appeals were consolidated and decided by the Circuit Court for Webster County in February 1986. The circuit court held that the challenged assessments violated petitioners' equal protection rights under the West Virginia Constitution and the Fourteenth Amendment.[5] That court ordered the county commission to reduce the assessments on petitioners' property to a value recommended in a state-wide appraisal guide published in 1975 by the West Virginia State Tax Commission.

The county commission appealed to the West Virginia Supreme Court of Appeals, which reversed the circuit court's judgment in a *per curiam* opinion. The state su-

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[3] The three transfers that triggered reassessment include the 1974 purchase by Allegheny Pittsburgh, the 1982 purchase by East Kentucky, and the 1977 purchase by Shamrock Coal. The 1981 acquisition by Oneida Coal did not trigger reassessment because the transfer was without cash consideration.

[4] With respect to the 7300 acres of land, Allegheny Pittsburgh's challenge relates to the years 1976 to 1983; East Kentucky's challenge relates to the years 1984 through 1986. With respect to the 7800 acres of land, the protests of Shamrock Coal and Oneida Coal relate to the years 1981 to 1986.

[5] The circuit court subsequently issued orders applying its decision to tax year 1986 as well. EKE Pet. App. 83a, 86a.

preme court held that the county assessor's use of acquisition price to determine the "true and actual value" of petitioners' properties complied with the requirements of the West Virginia Constitution, and rejected petitioners' equal protection challenge to the county assessor's practices on the ground that petitioners failed to demonstrate that comparable properties were intentionally and systematically undervalued.

SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment does not mandate a rule of exact equality. State and local governments have especially broad discretion to make classifications and distinctions in their tax structures and methods of valuation, as long as the distinctions are rationally related to legitimate state interests, are not drawn along inherently suspect lines, and do not trammel individual rights. Petitioners' equal protection challenge is directed against an assessment procedure that resembles those of other States, and that serves the interests of fairness and administrative convenience.

The Constitution of the State of West Virginia requires that property be assessed on the basis of its true and actual value. The County Assessor for Webster County, West Virginia, appraised petitioners' properties on the basis of the price they paid for each property. Petitioners purchased properties in Webster County, and the assessments of those properties were raised to reflect the acquisition prices. During the period 1976 to 1984, the county assessor also implemented at least three increases in the assessments of properties not recently transferred.

Petitioners failed to demonstrate that these actions of the county assessor undervalued *comparable* properties. Instead, petitioners sought to shift to the county assessor the burden of proving that *neighboring* properties with lower assessments were in fact not comparable to peti-

tioners' properties. The Equal Protection Clause does not require contemporaneous adjustments to the assessments of all potentially comparable properties in a system that values property based on "true and actual value." In the absence of a showing of intentional and systematic discrimination in the valuation of petitioners' properties, the court below properly declined to direct a reduction of their assessments.

ARGUMENT

I. STATE AND LOCAL GOVERNMENTS HAVE BROAD POWER TO ALLOCATE TAX BURDENS TO FURTHER DOMESTIC CONCERNS

The constitutional principles governing the taxation powers of state and local governments are well-established.

> The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests.

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526 (1959). State and local tax systems do not violate the Fourteenth Amendment, or any other provision of the Federal Constitution, merely because they produce disparate tax burdens. "Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937). The Equal Protection Clause prohibits "palpably arbitrary" or "invidious" differences in tax treatment; it does not preclude state and local governments from "draw[ing] lines that treat one class of individuals or entities differently from the others." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973).

Throughout this century, the Court has consistently upheld the constitutionality of rational taxation schemes reasonably related to a legitimate state purpose. The Court has confronted, and found constitutionally acceptable, a broad variety of property tax classification schemes that have drawn distinctions based on the identity of the taxpayer, the type of property, the use made of the property, and the government's domestic concerns with the administration and attendant expense of tax valuation and collection.[6] This Court has also expressly held that the broad leeway accorded state governments extends beyond classification of property for taxation and includes the power to "set up different modes of assessment [and] valuation." *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 368 (1940).

In all these cases, the Court refused to "assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy

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[6] *See, e.g., Lehnhausen*, 410 U.S. at 365 (Illinois taxation scheme that taxed corporate personal property but exempted individual personal property held constitutional; the Court accepted Illinois' argument that the individual personal property tax was "discriminatory, unfair, almost impossible to administer, and economically unsound"); *Allied Stores*, 358 U.S. at 530 (classification scheme that taxed residents but exempted nonresidents for merchandise held in storage is constitutional); *Independent Warehouses v. Scheele*, 331 U.S. 70 (1947) (taxation scheme distinguishing between private warehouses and commercial warehouses is constitutional); *Carmichael*, 301 U.S. at 511 ("[a]dministrative convenience and expense in the collection or measurement of the tax" may in some cases be "a sufficient justification for the difference in tax treatment); *Fox v. Standard Oil Co.*, 294 U.S. 87 (1935) (taxation system distinguishing between gasoline stations owned by chains and independently owned gas stations is constitutional); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) (tax system distinguishing between merchandise stored by a retail store owner for use in his own store and merchandise stored by a wholesaler for sale to a retailer is constitutional); *Southern Ry. Co. v. Watts*, 260 U.S. 519 (1923) (differential tax treatment of railway property is constitutional).

of the State." *Allied Stores*, 358 U.S. at 528. To the contrary, the Court has held that

> "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

Regan v. Taxation With Representation of Washington, 461 U.S. 540, 547-48 (1983) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)); *see Kahn v. Shevin*, 416 U.S. 351, 355-56 (1974).

The presumption of constitutionality "has weathered nearly a century of Supreme Court adjudication" (*Kahn v. Shevin*, 416 U.S. at 355-56) and is reflected throughout the Nation in a broad diversity of state and local tax systems. State and local governments have implemented a multitude of exemptions and variances to property tax structures in furtherance of a host of varying governmental objectives, including economic development, use of alternate energy sources, and pollution control. By way of example, the appendix to this brief summarizes the number of States using various tax classification systems to foster domestic concerns.

Not surprisingly, differential treatment of taxpayers has generally withstood constitutional challenge with respect to issues of valuation as well as classification. In Alabama, for example, property taxes are generally assessed on the basis of "fair and reasonable market value." *Weissinger v. White*, 733 F.2d 802, 804 (11th Cir. 1984). But Alabama also gives owners of agricultural and forest land the option to elect assessment based

on "current use value" (using a capitalized net income approach) rather than on "fair market value." *Id.* at 804-05. The Eleventh Circuit rejected an equal protection challenge to this difference in valuation technique in recognition of "Alabama's legitimate goal to preserve land for agriculture and forestry . . . ." *Id.* at 807. The court recognized and found constitutionally acceptable the argument that "[a] formula for the evaluation of farm and timber property that routinely holds assessment values below the normal selling price will certainly encourage the continued use of land for its present purpose." *Id.* at 806 (footnote omitted).

California offers another good example of the constitutional flexibility that state and local governments have exercised in the area of valuation of property for tax purposes. In June 1978, California voters added Article XIII A to the state constitution by adoption of an initiative measure commonly known as Proposition 13. The new article imposed important limitations upon the assessment and taxing powers of state and local governments. Pursuant to Section 2(a), real property is assessed not at current value, but rather at its value on the date of acquisition.[7] Various governmental entities and concerned citizens challenged the validity of the new measure on several grounds, including an equal protection claim grounded on the fact that "two substantially identical homes, located 'side by side' and receiving identical governmental services, could be assessed and taxed at different levels depending upon their date of acquisition." *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 233, 149 Cal. Rptr. 239, 250 (1978).

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[7] Specifically, the new constitutional provision "rolled back" assessments to the value specified by the county assessor in the 1975-1976 tax bill, "or thereafter the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred." The new article also authorized a two percent maximum annual inflationary increase.

The California Supreme Court properly rejected that equal protection challenge, relying in large part on this Court's pronouncements in cases such as *Allied Stores* and *Kahn v. Shevin*. The state court recognized that this Court had accepted "the general rule . . . that a tax classification or disparity of tax treatment will be sustained so long as it is founded upon some reasonable distinction or rational basis." 22 Cal.3d at 235, 149 Cal. Rptr. at 251. The California Supreme Court found a reasonable basis for Proposition 13 in the theory that property taxes should bear some rational relationship to the original cost of the property rather than to "an unforeseen, perhaps unduly inflated, current value." *Id.* This theory enables property owners to estimate "with some assurance [their] future tax liability." *Id.* The state court also found that the system was "fair and equitable" in that the tax "may be said reasonably to reflect the price [the taxpayer] was originally willing and able to pay for his property, rather than an inflated value fixed, after acquisition, in part on the basis of sales to third parties over which sales [the taxpayer] can exercise no control." *Id.*

The valuation used by the Webster County Assessor accommodates the same notion of fairness. In this case, the assessor generally valued property based on its most recent acquisition price, but that official also made other periodic adjustments to the values of property not recently transferred. The valuation distinctions drawn by the Webster County Assessor with respect to the coal property at issue here are supported by reasonable concerns with administrative convenience and expense, interests different from, but no less legitimate than, the interests supporting the valuation distinctions drawn in Alabama and California.

Valuation of coal and other resource real estate is particularly complex and costly, in large part because it requires detailed information regarding the quantity and quality of subsurface minerals. Changes in mineral market conditions and extraction of minerals over time also

affect the continued accuracy of prior valuations. In view of these factors, the reluctance of state and local governments to undertake frequent and costly reappraisals of resource real estate is a reasonable and legitimate domestic concern. This Court has expressly recognized that "[a]dministrative convenience and expense in the collection or measurement of the tax" may be "a sufficient justification" for distinctions among taxpayers. *Carmichael*, 301 U.S. at 511; *see, e.g., Lehnhausen*, 410 U.S. at 365 (accepting Illinois' argument that a personal, as opposed to a corporate, property tax would be "almost impossible to administer, and economically unsound").

Petitioners claim that the practices of the county assessor have "created a dual system of property tax assessment" violative of the Equal Protection Clause. Joint Brief at 20. Petitioners rely in this regard on *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23 (1931). The evidence in that case established that coal situated several miles from a river had only half the value of coal situated closer to the river, yet the county commissioners valued all coal lands at an identical rate per acre. This Court found that system violative of the Equal Protection Clause because it ignored "well-known and important differences in value." *Id.* at 30.

Unlike the commissioners in *Cumberland Coal*, the county assessor in this case was not confronted with "well-known" differences in value. To the contrary, the contention advanced by petitioners is that the county assessor failed to take into consideration *unknown* differences regarding the quantity and quality of mineral reserves as to which acquisition of meaningful information would require considerable expenditure of both time and money. *Cumberland Coal* simply does not suggest that the Equal Protection Clause imposes such a heavy burden on state and local governments.

In sum, the Court has traditionally accorded state and local governments wide flexibility in tailoring their tax

structures—and their methods of property valuation—to meet their legitimate concerns, including fairness and administrative convenience. Nothing in this case warrants a departure from that recognition of the States' constitutional "attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests" (*Allied Stores*, 358 U.S. at 526).

Moreover, this case does not offer an appropriate opportunity to revisit this long-standing constitutional principle. As demonstrated below, the West Virginia Supreme Court of Appeals specifically found that petitioners had failed to prove that comparable property of other taxpayers was intentionally and systematically undervalued. That factual finding effectively disposes of petitioners' equal protection claim, without the necessity of further justification of the tax disparity.

II. THE WEST VIRGINIA SUPREME COURT CORRECTLY CONCLUDED THAT PETITIONERS FAILED TO PROVE "INTENTIONAL AND SYSTEMATIC" DISCRIMINATION VIOLATIVE OF THE FOURTEENTH AMENDMENT

Petitioners invoke the well-established rule that "the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property." *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 28 (1931). They claim, citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), that the relative overassessment of their property entitles them to have their assessments reduced below "true value," even though state law requires "true value" assessment. The West Virginia Supreme Court of Appeals, which has consistently acknowledged and followed the principles enunciated in *Cumberland Coal* and *Sioux City Bridge* (see *Kline v. McCloud*, 326 S.E.2d 715, 724 (W.Va. 1984); *Killen v. Logan County*

Comm'n, 295 S.E.2d 689, 703-04 (W.Va. 1982)), correctly recognized that they do not apply to the present case.

The West Virginia Constitution provides that "all property, both real and personal, shall be taxed in proportion to its value," and assessed at a uniform percentage of its value. W. Va. Const. art. X, §§ 1, 1b. Under West Virginia Code § 11-3-1, "[a]ll property shall be assessed annually as of the first day of July at its true and actual value . . . ." The West Virginia Supreme Court has held that "the price paid for property in an arm's length transaction, while not conclusive, is relevant evidence of its true and actual value." *Kline v. McCloud*, 326 S.E.2d at 724. Beginning sometime prior to 1975, the County Assessor for Webster County assessed all recently transferred property based upon the value declared in the most recent deed of conveyance to a taxpayer. Pet. App. 27a. Property not recently transferred was generally carried on the tax rolls with the same assessment it had borne in prior years; the assessed values of such property were increased by approximately ten percent in the years 1976, 1982, and 1984. Pet. App. 6a, 27a-28a; EKE Pet. App. 58a.

As a result of these actions of the Webster County Assessor, petitioners' property was assessed based on the value declared in various deeds of conveyance executed in the period 1974 through 1982. Petitioners do not now argue that those assessments were based on values in excess of "true and actual value." Instead, petitioners claim that the failure of the Webster County Assessor contemporaneously to increase the assessment of property not recently transferred amounted to a "systematic and intentional" undervaluation of comparable properties violative of the Equal Protection Clause.

Petitioners assert that the actions of the county assessor produced "enormous disparities" of "historic mag-

nitude" in assessments in Webster County. Joint Brief at 33. In evaluating the validity of petitioners' claim based on the record established below, it is important to recognize that this is not a case involving assessments or reassessments of residential properties in condominium developments or in urban or suburban neighborhoods.[8] In such cases, aggrieved taxpayers presumably can more readily establish the value of truly "comparable" properties, and the taxing authority might find it difficult to assert administrative convenience and expense as a justification for refusing to reassess neighboring units or houses.[9]

This case instead involves the valuation of over 15,000 acres of resource real estate. Some of the acreage is held in fee, and the balance of the ownership is in surface or mineral interests or various combinations thereof. AP Pet. at 3; EKE Pet. at 3; Joint Brief at 5-6. Analysis of the comparability of such property to neighboring parcels and determination of the value of such property interests is necessarily a complicated, expensive, and time-consuming process that requires information regarding numerous factors, especially the quality and quantity of subsurface minerals and projected extraction costs.

Federal and state courts have long recognized the complexity of determining comparability and valuation in the context of resource real estate.[10] The professional

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[8] Petitioners label themselves "stand-ins" for "untold numbers of new homeowners" in Webster County. Joint Brief at 40. But this case presents no issue as to the application of the county assessor's practices in the context of residential assessments in Webster County.

[9] The rate at which residential property is transferred may also vary dramatically compared with commercial and resource real estate, and that factor could also affect the constitutional analysis in the residential context.

[10] *See, e.g., United States v. 1,606.00 Acres of Land*, 698 F.2d 402, 404 (10th Cir. 1983) (noting that expert witness who appraised

literature similarly emphasizes that determinations of comparability require detailed information.[11]

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the value of certain mineral rights had "detailed the complex steps he had taken in making the appraisals"); *United States v. Silver Queen Mining Co.*, 285 F.2d 506, 510 (10th Cir. 1960) ("Some speculation is inherent in the ascertainment of value of all resource property, be it mineral, oil, gas or otherwise"); *Usibelli v. Commissioner of Internal Revenue*, 229 F.2d 539, 541 (9th Cir. 1955) (noting that valuation of mineral deposits "rests upon factors extremely difficult of accurate ascertainment such as the size and quality of the deposit"); *Tug Valley Recovery Center, Inc. v. Mingo County Comm'n*, 261 S.E.2d 165, 173 (W. Va. 1979) ("assessment of real estate values is a very technical and complex area, particularly insofar as we are dealing with the assessment of mineral estates, those estates being invisible to the eye and being difficult to properly and scientifically assess"); *Department of Revenue v. Ford*, 438 So.2d 798, 801-02 (Fla. 1983), *cert. denied and appeal dismissed*, 466 U.S. 946 (1984) (recognizing "the unique difficulty involved in the valuation of subsurface mineral rights" and concluding that the assessment of subsurface rights "impose[s] difficult burdens upon Florida property appraisers"); *Gunsch v. Gunsch*, 71 N.W.2d 623, 631 (N.D. 1955) ("[t]he exact value of real estate is usually difficult to determine. The problem is especially difficult when the value is that of undiscovered minerals. It is a matter of common knowledge that the value of property conveyed by mineral deed in western North Dakota is derived chiefly from oil or coal, or both. The value of such property is more difficult to establish outside of proven areas than is the value of ordinary real estate.").

[11] *See, e.g.*, Merritt, *Coal Exploration, Mine Planning, and Development* 12-13 (Noyes Publications 1986) ("The important resource factors which determine the usefulness of a coal deposit are: 1) coal quality; 2) overburden, thickness and quality; 3) the thickness and continuity of the seam(s), as well as the overall size of the deposit; 4) the geologic structure of the basin; and 5) the strategic location of the deposit with respect to transportation facilities and potential markets . . . . Coal quality, reserve tonnage, environmental conditions, and geological engineering determine the economic minability of a given coal deposit."); Boyd, *Fundamentals of Coal and Mineral Valuations* 101 (C.J. Krehbiel Co. 1986) ("comparable sales case studies should include the same seam(s), have similar geologic and quality characteristics, and be in the same general locality as the property being valued"); Interagency Land Acquisition Conference, *Uniform Appraisal Standards For Federal*

The record reflects that differences in assessments of petitioners' property and *neighboring* property ranged from 800 to 3500 percent. Joint Brief at 33. But those statistics hardly prove unconstitutional discrimination. In fact, the record reflects even wider disparities (as high as 7500 percent) among the assessments of the various parcels in the tract purchased by Allegheny Pittsburgh, and later by East Kentucky.[12] In short, the record contains no showing that petitioners' property and the neighboring property are in fact *comparable*.

With respect to the property held by Oneida Coal and Shamrock Coal, petitioners contend that the disparities in assessment between petitioners' property and "comparable" property ranged from 800 to 2000 percent. Joint Brief at 33. But these percentages are based solely on land book values of neighboring properties. Petitioners offered no expert testimony as to the comparability of such factors as quantity, quality, or difficulty of extraction of the mineral interests on the neighboring tracts. EKE Pet. App. 55a-56a, 60a-62a. In fact, the record demonstrates that there are variations in the extent of mineral interests even *within* certain tracts of petitioners' land.[13] Absent persuasive evidence, the state

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Land Acquisitions 9 (Wash., D.C. 1973) ("Comparison of sales transactions to subject property being appraised" should include information as to "[p]hysical [and] [e]conomic similarities and dissimilarities"); Department of Justice, *A Procedural Guide For The Acquisition Of Real Property By Governmental Agencies* 7 (Wash., D.C. 1965) (emphasizing that acquisition of property with mineral deposits requires review of "detailed valuation estimates").

[12] Allegheny Pittsburgh's assessments in 1976 ranged from $59.89 to $4,516.13 per acre. East Kentucky's assessments in 1984 ranged from $65.87 to $4,967.74 per acre. See Exhibit C, Pet. App. 20a.

[13] For example, East Kentucky's own witness testified that almost all of the 32 million tons of strip mineable coal on East Kentucky's 7,300 acres is located on the western half of the property. Resp. Br. in Opp. 23a.

supreme court was not required to *assume* comparability of neighboring parcels of resource real estate.

With respect to the property held by Allegheny Pittsburgh and East Kentucky (for which the assessment differentials with purportedly "comparable" properties are in the range of 3200 to 3500 percent, Joint Brief at 33), petitioners offered but one expert witness who testified only that nine identified parcels were "geologically . . . comparable" to the East Kentucky tract, by which he meant that they have "the same coal seams present in the area." Resp. Br. in Opp. 6a, 25a. That expert testified that:

—seams vary across property (*id.* at 15a);

—core borings are necessary to confirm an expectation of the presence of a seam (*id.*);

—although he had information from core borings on the East Kentucky tract, he had such information with respect to only two of the nine purportedly comparable tracts, and did not have with him the information on the estimates of mineable reserves on those two purportedly comparable tracts (*id.* at 10a, 14a);

—coal throughout the area varies in thickness, quality, and mineability (*id.* at 15a-16a); and

—although the expert was of the view that there were 32 million tons of strip mineable coal on the East Kentucky tract, he had no estimate as to the number of tons of recoverable coal on some of the purportedly comparable tracts as to which he believed there was mineable coal (*id.* at 16a-19a, 24a).

Petitioners Allegheny Pittsburgh and East Kentucky also rely on a stipulation in which the parties agreed that the neighboring land parcels identified by petitioners were "comparable properties in that they are substantially the same geologically as [petitioners'] prop-

erty." Joint Brief at 8 & n.5.[14] As noted above, "geological" similarity does not in and of itself establish comparability for purposes of valuation. Cases decided by this Court as well as the West Virgina Supreme Court indicate that mere "geological" similarity is hardly sufficient to meet the applicable burden of proof in this type of case. In *Cumberland Coal*, for example, this Court found unconstitutional a taxing scheme that was alleged to have placed the same value on all coal acreage " 'regardless of the remoteness or accessibility of the said coal to market, cost of operation, or means of transportation . . . .' " 284 U.S. at 24. Yet all the lands at issue in *Cumberland Coal* were undoubtedly substantially the same geologically because the same coal seams were present in the area. The West Virginia Supreme Court of Appeals rejected a similar "one factor" comparison in *Bankers Pocahontas Coal Co. v. County Court*, 135 W. Va. 174, 62 S.E.2d 801, 802, 806 (1950), *overruled in part on other grounds, In re Assessment of Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959).

State law requires a taxpayer who challenges an assessment to "show by a preponderance of the evidence that the assessment is incorrect." *Killen v. Logan County Comm'n* (Syllabus Point 8).[15] Moreover, under state law, "[a]n objection to any assessment value may be sustained only upon the presentation of competent evidence, such as that

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[14] This stipulation was apparently not agreed to in the proceeding involving Shamrock Coal and Oneida Coal.

[15] The West Virginia Supreme Court of Appeals prepares the syllabus in each reported decision, and that court has held that the syllabus is the controlling statement of the law. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S.E. 1000, 1006 (1892). The statements contained in the syllabus, however, must be "read in the light of the opinion." *Jones v. Jones*, 133 W. Va. 306, 58 S.E.2d 857, 859 (1949). *See also Koonce v. Doolittle*, 48 W. Va. 592, 37 S.E. 644 (1900) (the adjudication of facts by the Supreme Court of Appeals is not required to be made in the syllabus).

equivalent to testimony of qualified appraisers." *Killen*, 295 S.E.2d at 706.[16] As the West Virginia Supreme Court held, the record in this case lacks the required evidence.

Petitioners were successful before the trial court not because they established "enormous disparities" in assessments of properties proven by petitioners to be comparable to their own, but rather because they persuaded the trial court that the assessor had not proven that the purportedly comparable properties were sufficiently dissimilar to petitioners' property. The trial court simply misplaced the burden of proof.[17]

Petitioners now ask this Court to rule that a system that reassesses recently transferred property based on acquisition price is constitutionally infirm unless the assessor also incurs the expense and inconvenience of contemporaneously identifying and reassessing all other properties, or all other properties asserted but not proved to be comparable. The Equal Protection Clause has never been held to place such an intolerable burden on state and

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[16] In this context, that burden of proof is wholly consistent with the showing required under federal law. *Regan v. Taxation With Representation of Washington*, 461 U.S. at 547-48; *Lehnhausen*, 410 U.S. at 359-60; *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 353 (1918) ("the burden of proof is upon the complaining party.").

[17] Petitioners assert that the trial court "found" the neighboring parcels of coal property "to be comparable in all respects" to petitioners' property. *E.g.*, Joint Brief at 8. To the extent the trial court made such a finding, it was based on the failure of the County Commission to prove that properties *asserted* by petitioners to be comparable were in fact not comparable. See Pet. App. 29a-30a.

Petitioners also assert that the findings of the trial court were "undisturbed by the Supreme Court of Appeals." Joint Brief at 26. But the state supreme court expressly concluded that the record did not support the trial court's ruling that the actions of the assessor and board of review constituted "intentional and systematic" discrimination. Pet. App. 8a.

local governments. Especially in cases such as this one, where the properties at issue present costly and difficult questions of valuation of subsurface minerals, the taxing authorities should be free to rely on acquisition value without a constitutional mandate for contemporaneous reassessment of other properties.

Thus, it is hardly surprising that the West Virginia Supreme Court concluded that "the record does not support the trial court's ruling that the actions of the assessor and board of review constitute 'intentional and systematic' discrimination." Pet. App. 8a. That conclusion is correct.

III. THE WEST VIRGINIA SUPREME COURT DID NOT RELEGATE PETITIONERS TO AN UNCONSTITUTIONAL REMEDY

Petitioners' claim to a reduction in the tax assessor's valuation of their property depends upon the remedy prescribed by this Court in *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), for a taxpayer who has established intentional and systematic undervaluation of the comparable property of others, in violation of the Equal Protection Clause. In the present case, as we have shown, there is no proof that disparities in tax valuation resulted from intentional and systematic undervaluation of properties other than those purchased by petitioners, nor even that the demonstrated disparities existed with respect to properties that were truly comparable. Accordingly, the West Virginia Supreme Court of Appeals properly denied petitioners a reduction in the valuation of their property.

The decision was consistent with other cases recently decided by the West Virginia Supreme Court of Appeals addressing the two different "remedies" that can be implemented in appropriate circumstances to resolve claims of disparate property tax valuation. Each of those remedies is consistent with prior decisions of this Court.

First, the West Virginia Supreme Court has reaffirmed the availability of a *Sioux City Bridge* "reduction in assessment" remedy where the objecting taxpayer has established intentional and systematic undervaluation violative of the Equal Protection Clause or the "equal and uniform" mandate of the state constitution. *Killen v. Logan County Comm'n*, 295 S.E.2d at 703 (adhering to the rule that "where uniformity of taxation and full value assessment could not be reconciled, uniformity took precedence").[18] That remedy is not applicable here, and was not implemented by the state supreme court, precisely because that court found no evidence in the record of intentional and systematic undervaluation.

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[18] Concern with the effect of the "reduction in assessment" remedy prompted the West Virginia Supreme Court to suggest shifting to the state tax commissioner the burden of seeking increases in the assessments of third parties. In *State ex rel. Rose v. Fewell*, 294 S.E.2d 434, 438 (W. Va. 1982), the court noted that the state legislature "has clothed the [state] tax commissioner with general authority and responsibility for assessment" and has designated that officer as "the state official ultimately responsible for ensuring equitable assessment" in West Virginia. In *Killen*, the court suggested that the state tax commissioner might be an "indispensable party" to taxpayer litigation "concerning equal and uniform or market value assessments [in] actions which challenge an entire class of assessments . . . ." 295 S.E.2d at 709. The state supreme court expressed the view that such participation by the state tax commissioner could eliminate the need for the *Sioux City Bridge* "reduction in assessment" remedy (*id.*), which is grounded on the burden the complaining taxpayer would confront in seeking to raise numerous third party assessments. *See Sioux City Bridge*, 260 U.S. 466-47.

In 1986, the state legislature enacted legislation requiring the state tax commissioner to undertake a statewide reappraisal of property to reflect "true value." W. Va. Code §§ 11-1B-1 *et seq.* Interestingly, petitioners conceded in their brief to the state supreme court in this case that reduction in assessment actions "may very well be precluded in the future after the State Tax Commissioner has fully coordinated and implemented the state-wide reassessment of real property as required by *W. Va. Code* §§ 11-1B-1 et seq." Brief of the Appellees at 73.

Second, the West Virginia Supreme Court has held that state law provides third parties with standing to challenge the assessment values of properties owned by others and to seek increases in those assessments. *Tug Valley Recovery Center, Inc. v. Mingo County Comm'n*, 261 S.E.2d 165, 170 (W. Va. 1979). Even where there is no proof of intentional and systematic discrimination, a taxpayer who believes that neighboring properties have been undervalued has a remedy in West Virginia.

With these alternative remedies in mind, the action of the West Virginia Supreme Court in this case becomes clear. Finding no evidence of intentional and systematic undervaluation of comparable properties in the case, the court reminded petitioners of their right under *Tug Valley* to seek increases in the assessments of particular properties they believe to be undervalued. This approach is wholly consistent with *Louis K. Liggett Co. v. Lee*, 288 U.S. at 540 (interested parties who "deem the tax illegally omitted in certain cases . . . may apply for a writ of mandamus to compel the taxing officials to do their duty.").[19]

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[19] The opinion issued by the West Virginia Supreme Court is not a model of clarity, although *amici* submit that its thrust is the lack of evidence to support petitioners' claims of intentional and systematic undervaluation of properties other than their tracts. It is possible, however, that this Court might interpret the opinion as avoiding the discrimination issue on the ground that petitioners' sole remedy is in any event to " 'seek to have the assessments of other taxpayers raised to market value.' " Pet. App. 9a, quoting *Killen v. Logan County Comm'n*, 295 S.E.2d at 709. If this Court construes the opinion as a ruling that even if intentional discrimination exists, petitioners' sole remedy would be that enunciated in *Kline v. McCloud*, we urge that the appropriate disposition is to reverse the judgment and remand to the West Virginia Supreme Court of Appeals "for a further hearing upon the issue of discrimination." *Sioux City Bridge*, 260 U.S. at 447.

CONCLUSION

For the foregoing reasons, the judgment of the West Virginia Supreme Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

USE OF PROPERTY TAX SYSTEMS TO IMPLEMENT STATE POLICY OBJECTIVES *

Type of Program	Number of States Using Program
Abatements for Use of Alternate Energy	27 [1]
Abatements for Pollution Control	24 [2]
Abatements for Urban Redevelopment	12 [3]
Abatements for Industrial or Business Development	21 [4]
Abatements Serving Other Governmental Objectives	14 [5]
Use of Differential Rates for Varying Uses of Real Property	11 [6]

[1] Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Vermont, Washington, and Wisconsin.

[2] Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

[3] Connecticut, Hawaii, Indiana, Iowa, Louisiana, Minnesota, Missouri, New Jersey, New York, Ohio, Oklahoma, and Virginia.

[4] Alabama, Arkansas, Florida, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, and Vermont.

[5] Alabama, Arizona, Arkansas, Colorado, Hawaii, Maine, Maryland, Mississippi, New Hampshire, North Dakota, Oregon, Tennessee, Vermont, and Wyoming.

[6] Alabama, Arizona, Colorado, Louisiana, Massachusetts, Minnesota, Montana, North Dakota, South Carolina, Utah, and West Virginia.

* SOURCE: National Ass'n of State Development Agencies, *Directory of Incentives for Business Investment and Development in the United States—A State-by-State Guide* (Urban Institute Press, 2d Ed. 1986).